THE

MONTHLY LAW REPORTER.

DECEMBER, 1855.

MANDAMUS IN ECCLESIASTICAL CASES IN AMERICA.

[The following opinion, relating to the subject indicated above, we submit to our readers as a valuable discussion of a novel and interesting question. The course of events in the case rendered any legal proceedings unnecessary, so that no action was had upon the opinion, and the matter has never been the subject of judicial investigation. The question, however, may hereafter become one of practical importance, and we are glad to preserve this paper; and although we do not append the name of the counsel from whom it emanated, we feel at liberty to say that that would increase the value to be attached to it. — Eds.]

STATEMENT OF FACTS.

The Rev. O. S. Prescott was a presbyter of the Protestant Episcopal Church, in the diocese of Massachusetts, in regular orders, performing the duties of his office and receiving compensation therefor, but not, at the time, settled over any particular parish. He was tried before an ecclesiastical court, on charges of heretical teachings and practices. He was acquitted of heretical teachings and practices, but the court found, specially, that he had claimed the right to practise private confession and absolution, which, in their opinion, would be, if practised, not heretical, but irregular; but that there was no proof of his having actually practised them. On this finding of the Court, the bishop of the diocese sentenced him to suspension from the office of a presbyter until he should sign a declaration that he would not inculcate or practise private confession and absolution. From this action of the bishop, the

church affords no appeal. The objections to the sentence are, (1) That the finding of the court amounted to an acquittal; (2) That, if it was a conviction, it was for something not charged, and not punishable by the law of the church; and (3) That the sentence was unlawful, under any circumstances.

The question submitted for an opinion is, whether a writ of mandamus will lie from the Supreme Court of Massachusetts to the bishop of the diocese, requiring him to restore Mr. Prescott to the office and functions of a presbyter.

OPINION.

It is, of course, understood that the civil tribunals have no jurisdiction to re-examine the trials and decisions of ecclesiastical tribunals, in this country, in the nature of appeals. In this case, it is not asked that the Supreme Court shall re-try the questions of fact or doctrine involved in the decision, or review, in any way, the merits of the case. The question is whether, by a writ of mandamus, the Supreme Court can determine the question of the authority of the bishop to pass such a sentence, upon such a finding of a court, according to the law of the Episcopal Church; and, if he has not such authority, then to require him to restore the presbyter to his office.

Mandamus is the appropriate remedy to compel any person "to perform some particular thing which appertains to his office or duty," or to "restore any person to an office or franchise of a public nature, whether spiritual or temporal." 3 Bl. Com. 110.

I. The office, franchise or function must be of a "public nature." No exact definition of what constitutes a "public nature" in an office has ever been given. Bacon says (Abr. Mandamus C. p. 529), an office or franchise "that concerns the public;" and Lord Mansfield says, in *R.* v. *Barker*, 3 Burr. 1265, an office of "public concern." It is acknowledged that, since Mansfield's time, the limits of this writ have been much extended. In *R.* v. *Barker*, he says: "The value of the matter or degree of its importance to public police is not scrupulously weighed." In that case, the writ was granted to restore a dissenting clergman to a meeting-house built by a private bequest and held by private trustees, unincorporated. Similar language was used by our own court in the case of St. Luke's Church, in Chelsea (*St. Luke's Church* v. *Slack*,

7 Cush. 226): "The value of the matter and degree of public importance are not to be too nicely weighed."

Accordingly, in England, this writ has been granted in the following cases, deemed to be of sufficient public importance or concernment. Churchwardens, sextons and clerks, — 5 Com. Dig. Mandamus A. Prebends, — Ib. Dissenting teachers, — Ib. Members of pecuniary corporations, attornies in inferior courts, sextons, schoolmasters holding for life, registers in ecclesiastical courts, treasurers of chartered companies, — Bacon's Abr. 529, "Mandamus C." Also in case of a scavenger, —Styles, 346.

3 T. R. 146, *R.* v. *Commissioners for the Collection of a Window Tax*, requiring them to elect a clerk.

2 T. R. 182, note, *R.* v. *London*, to restore the clerk of the city works.

3 Burrows, 1265, *R.* v. *Barker*. Case of a minister of a dissenting chapel, built and held as a private charity. This is a leading and fully considered case. The court refers to cases of clerks, sextons, lecturers, attornies of inferior courts and scavengers.

Raymond, 56 and 94, *Hurst's* case. Case of the attorney to the town court of Canterbury. At first doubted, but afterwards granted. (Same case, 1 Levinz, 75.)

Raymond, 69 and 92, *Townsend's* case. To the mayor of a town to compel him to make free an apprentice.

T. Raymond, 211, *Isles'* case. To restore a parish sexton. (Same case, 1 Ventr. 143.)

1 Wilson, 13. To bailiffs to license a schoolmaster.

1 Sid. 169, *Middleton's* case. To admit the treasurer of the New River Co.

2 Sid. 112. Clerk of the city works.

2 Levinz, 18, *King's clerk*. After argument, case of a sexton.

2 Strange, 832, *Shire*. Yeoman of the wood-wharf.

2 Strange, 1082. A prebend of a cathedral.

2 Strange, 797, *Rex* v. *Chester*. Chaplain of a college.

1 Strange, 159, *R.* v. *Dean and Chapter of Norwich*. To restore Dr. Sherlock to his stall and voice as a prebend.

1 Strange, 557. To restore Dr. Bently to his degrees at the university at Cambridge.

1 Strange, 58. To restore the master of a chartered grammar school.

1 Strange, 608. To swear in an ale-taster, he being a returning officer.

2 Strange, 696. To swear in the directors of a chartered insurance company.

2 Burrows, 1045, *R.* v. *Blooer.* To a parishioner who had removed a curate.

2 Burrows, 1000, *R.* v. *The Turkey Co.* To compel the admission of the relator as a member of a company of merchants.

2 Ad. & E. (N. S.) 64, *R.* v. *Bristol Dock Co.* To compel the company to excavate a basin.

4 Ad. & E. (N. S.) 157, *R.* v. *Abrahams.* Granted against churchwardens to compel them to deliver to certain private persons the key of a chest belonging to a private charity. This was strongly contested on the ground that it was merely the case of a private right.

5 Ad. & E. (N. S.) 614, *R.* v. *Smith.* To restore a parish clerk and sexton.

6 Ad. & E. (N. S.) 682, *R.* v. *Darlington School.* To restore the master of a chartered grammar school.

5 B. & Ad. 438, *R.* v. *Cheshunt.* To restore the clerk of a turnpike corporation.

6 Harr. Dig. 910, (11 Jurist. 867,) *R.* v. *London.* To admit an attorney of an inferior court.

In America it has been granted in the following cases:

To the school committee of Worcester, Mass., to compel them to examine a boy for admission to a school founded by a private legacy. *Nourse* v. *Merriam*, 8 Cush. 11. To private persons to restore parish records to the churchwardens. 7 Cush. 226, *St. Luke's Church* v. *Slack.* To the African Methodist Ep. Soc. to restore the relator to "his standing" as a member of the society. 1 S. & R. 254, *Greene* v. *Af. Meth. Ep. Soc.* To restore a clergyman to "his place and function" as minister of the German Reformed Church. 4 Har. & M'H. 429, *Runkel* v. *Winemüller.* To the trustees of the Meth. Ep. Church in Brooklyn, N. Y., to compel them to receive the relator as their pastor. 2 Barbour, 397, *People* v. *Steele.* To restore the relator to his place and practice as minister of the German Catholic Church of St. John, Baltimore. 1 H. & J. 480, *Brosius* v. *Renter.* To the cashier of a bank to open his books to the inspection of a stockholder. 12 Wend. 183, *People* v. *Throop.* To restore an attorney of the court of common pleas. 1 Johns. Cases, 181, *People* v. *Justices of C. C. P.*

In Massachusetts, the office of a clergyman has always been considered as "of a public nature," one "that concerns the public." Constit. of Massachusetts, part 1, act 2,

Amendment Act, 11; Rev. Stat. ch. 20, sec. 3. The laws relating to the office have been recognized and enforced in the courts. A kind of customary ecclesiastical law has been adopted and executed in our courts, on the express reason that the office and its relations are of public importance. 3 Mass. 160, *Avery* v. *Tyringham;* 9 Mass. 277, *Burr* v. *Sandwich;* 5 Pick. 469, *Thompson* v. *Rehoboth Congregational Society;* 24 Pick. 281, *Sheldon* v. *Easton;* 21 Pick. 114, *Stearns* v. *Bedford;* 7 Met. 495, *Hollis St. Church* v. *Pierpont.* If in the above cases, instead of suing for his salary at the end of a year's service, the clergyman had applied at the outset for a mandamus, can it be doubted that it would have been granted?

In 4 Har. & M'H. 429, *Runkel* v. *Winemüller*, it was strongly argued that the right of a clergyman to his salary and pulpit was a mere private right, to be determined like any other private right founded on contract; but the court overruled the argument, and issued the peremptory mandamus. The same ground was taken in *St. Luke's Ch.* v. *Slack* (*suprà*), but the court said that "the rights, peace and order of a religious society is of great public importance." In *Greene* v. *African Meth. Soc.*, *People* v. *Steele*, and *Brosius* v. *Renter* (*suprà*), the argument was not attempted.

II. It has been said that the office of minister must be *endowed*, or the court will not issue this writ. In *Runkel* v. *Winemüller* (*suprà*), the court defines endowment, for this purpose, to be pay or compensation, in any form; and in *People* v. *Steele* (*suprà*), the court defines an endowed minister to be one to whose function emoluments are attached. In *People* v. *Steele*, and *Brosius* v. *Renter*, it is not probable that any salary was attached to the service of the clergyman in the particular parish, from the known practice of the denominations concerned. Sextons and clerks are paid by fees, and in the case of an attorney (1 Johns. Cases, 181; 1 Harr. Dig. 910, &c., cited above), there is no salary, and not necessarily any fees. The attorney has only an opportunity to earn fees. In the *Protector* v. *Craford*, Style, 457, it was distinctly said by the court that it made no difference whether the office is paid by fees or a salary; and Lord Mansfield uses the term, "attended with profit." 3 Burr. 1265. In the case of a student's degrees, there is no direct emolument attached to the office, yet the party has, as the court said in *R.* v. *Cheshunt*, 5 B. & Ad. 438, "a valuable estate in his office."

In the case of a churchwarden, and in some other cases in which the writ is granted, there is no pecuniary value attached to the office. Indeed, it may be a pecuniary loss to the holder. The only objection to granting the writ to restore a barrister, who cannot recover his charges in a suit, was that there was an appeal from the Inns to the twelve judges. Dougl. 353, *R.* v. *Gray's Inn.* Blackstone does not require any pecuniary emolument to be attached to the office, nor does Bacon or Comyn; and in 3 Burr. 1265, *R.* v. *Barker*, Lord Mansfield said the office must be one of public concern *or* attended with profit. Indeed, it can scarcely be doubted that it would lie in the case of an office of honor and great public concern, even if pecuniarily burdensome to the holder. The reason for the expressions of this nature found in the books seems to be the proper requirement, that the relator shall have an interest in the subject-matter, and the consideration that, as the writ is one of discretion, the value of the office to the holder is sometimes a proper matter of consideration in a doubtful case, where the importance of the office to the public is not great, and the tenure slight. Just as, in some cases, the court has refused the writ where the term was a short one, or the party held at will. No case has ever arisen where the want of emolument attached to the office has alone been held a cause for refusing the writ.

In 1 T. R. 331, *R.* v. *B. of London*, the writ was refused, not on the ground that the office was unendowed, but because the rector had a right to refuse to receive the lecturer. The want of endowment was only alluded to as evidence against the usage set up. This case has often been misunderstood, and has led to language like that in *People* v. *Steele* and *Runkel* v. *Winemüller*, where it was, however, *obiter dictum*, as the offices in those cases were of pecuniary value. In *R.* v. *Jotham*, 3 T. R. 575, the refusal was on the ground that the relator had not complied with the acts of parliament; and in *R.* v. *Croydon*, 5 T. R. 713, on the ground that the tenure was at will.

In the case of a presbyter of the Episcopal Church, the holding the office is essential to his being settled or officiating, and thus obtaining compensation or emolument in any form. He qualifies himself for the office at great expense of time and money, sacrifices all other means of obtaining a livelihood, in faith of the contract between himself and the church, that if qualified he shall be admitted, and, if admitted, shall not be prohibited from

officiating, and thus earning his living, except for certain causes set forth in the constitution and canons. His case is the same that the case of an attorney would be, if none but attornies could practice in the courts.

III. An objection may be raised that the civil courts will not interfere in ecclesiastical cases. The answer is, that if the spiritual office is one that draws after it temporal emolument, or that concerns the public, the civil courts must vindicate the public or private right, although in doing so they may incidentally be obliged to decide on some questions of ecclesiastical law. A confusion has arisen in these cases from a want of attention to the difference between English ecclesiastical law and our own. In England, the ecclesiastical law is a part of the public law, and has its courts established by law, with power to enforce decrees, compel the attendance of witnesses, and all the other incidents of a court, and the king is the head and fountain of this law, as well as of the common law, and the equity, admiralty and martial law. Hence they form only different streams from the same fountain, and the common law courts are less willing to interfere with questions which have a recognized tribunal for their decisions. But in this country there is no legal tribunal for ecclesiastical law, — what we call ecclesiastical courts, in the different denominations, being merely voluntary bodies acting by agreement of parties. Hence the question of collision between legal tribunals does not arise in America. If there are rights, public or private, to be enforced, they can be enforced only in the civil courts. All the questions, therefore, in this commonwealth, relating to the relative rights and duties of parish and pastor, the right to officiate and receive a salary, and the existence or dissolution of the pastoral relation, have been decided in the civil tribunals, and, by a long course of decisions, they have determined the effect to be given to the decisions of the councils of the Congregational denomination.

In *Burr* v. *Sandwich*, 9 Mass. 277, the question was whether the pastor had been legally dismissed by a council. The court held that he had unreasonably refused to join in a mutual council, and therefore that an *ex parte* council was properly called; and that the reason assigned by the council for the recommending a dissolution of the relation, — to wit, a material change of doctrine, — was a sufficient reason, and justified the parish. The court inquired into all the circumstances, to satisfy itself that the council was

fairly called, impartially selected, and acted with fairness and propriety.

In *Thompson* v. *Rehoboth Congregational Society*, 5 Pick. 469, the question was the same, and the court held that the decision of the *ex parte* council was void, because a mutual council had not been first unreasonably refused by the pastor. In *Sheldon* v. *Easton*, 24 Pick. 281, the question was the same, and the whole law was fully gone into. An *ex parte* council had decided that the relation should be dissolved, on the ground that the pastor had recently refused to exchange with a clergyman of a certain denomination, with whom he had always before exchanged. The court held that this was not a sufficient reason, and that, therefore, the parish which acted upon the decision was not justified. In *Hollis St. Church* v. *Pierpont*, 7 Met. 495, one question was, whether the parish could refuse to pay a salary after a mutual council had decided against a dissolution of the relation, and the pastor had conformed thereto. It was held that it could not. The court examined into the organization and action of the mutual council, to see if it was impeachable. It was decided, that the action of the council justified the party who conformed to it, if it was properly obtained on legal grounds and for sufficient reasons, of which the court was to judge; and that the decision could be annulled by a court of law for partiality or misconduct, or if the grounds assigned were insufficient, but that its decision on the facts was conclusive.

In all these cases the court has recognized, construed, limited and enforced the customary law of the congregational churches, received the decisions of its tribunals on questions of fact, and annulled them whenever they have gone beyond their jurisdiction, or when they were founded on cases which, by the customary law of the churches and the reason of the thing, were not sufficient to warrant the decision.[1]

No precise line has been drawn to indicate how far the court will go in reviewing the action of an ecclesiastical body. As these bodies are not empowered by the public, but only by the church, the rules applicable to judicial tribunals do not necessarily apply to them. But, in this case, it is not necessary to draw the line, as the facts do not require the court to go further than they have done in the above cases.

[1] See also *Earle* v. *Wood*, 8 Cush. 430, decided since this opinion was given.

An ecclesiastical court has pronounced a sentence, and the bishop has acted upon and enforced it.

The objections to the sentence are:

I. That the court did not, in fact, find Mr. Prescott guilty on any charge on which he was presented.

II. That if the sentence is to be considered as one of conviction, it was for an offence not punishable by the law of the church.

III. That if both these objections are answered, the sentence was one unknown to the law of the church.

IV. That the bishop did not allow Mr. Prescott the time for his decision which the sentence of the court granted him.

If there were a salary attached to the office of presbyter, and, after this sentence, Mr. Prescott had sued for his salary, and this sentence were set up as a defence to the payment, on the principle of the cases cited from Massachusetts, Pickering and Metcalf, the court would be obliged to pass upon these four objections.

In other states the same course has been pursued.

In *Brosius* v. *Renter*, 1 H. & J. 551, an alternative mandamus was issued to a Roman Catholic parish, in Baltimore, to admit the relator to the place and function of a minister of the parish to which he had been appointed by the bishop. The question raised on the return was whether, by the law of the Roman Catholic Church in Maryland, the right of appointing ministers of parishes was in the bishop alone, or wholly or partly in the parish. The court granted the peremptory writ.

In 4 Har. & M'H. 429, *Runkel* v. *Winemüller*, an alternative mandamus was issued to a parish of the German Reformed Church, to restore the relator to his "place and function" as a minister. It was strongly contended, by able counsel, that a religious society was a voluntary private association, and that the right of a clergyman to his place and salary was a private right, not concerning the public. The court passed upon the rights of both parties under the law of their church, and issued the peremptory writ.

In *Greene* v. *African Meth. Ep. Soc.*, 1 S. & R. 254, the court decided upon the construction of the rules of the society, overruled the action of the society, which was in its nature a judicial action, and restored the relator "to his standing" as a member.

In *State* v. *Crowell*, 4 Halsted, 391, the question before the court really was, which of two bodies was, by the

written and customary law of the Presbyterian church, the trustees of the Presbyterian society. The writ was a *quo warranto*, and the election of the trustees was vacated. The question turned upon the right of certain persons to vote; and this right depended, not on the common or statute law, but on the rules and usages of the denomination.

In *People* v. *Steele*, 2 Barbour, 397, the question which arose on the return to the first writ of mandamus, was whether, by the written and customary law of the Methodist denomination in the United States, the bishop has the sole power to assign pastors to the several churches, or the churches have a right of selection or rejection. The court, after an elaborate examination of the doings of the conferences, the writings of Wesley and other leading divines of that denomination, decided that, according to the "doctrine and discipline of the Methodist Church," the power of appointment lay with the bishop, and issued the peremptory mandamus.

In *Commonwealth* v. *Green*, 4 Wharton, 531, which was a *quo warranto* against persons claiming to be trustees of the Presbyterian Church of the United States, the question was, which of two bodies was the true trustees. This depended upon the question, which of two elections claimed to have been made by the Presbyterian General Assembly was the valid one. This required an examination of the legislative action of the General Assembly of the Presbyterian church (not an incorporated body), for several successive sessions, and of the action of certain synods, in order to determine the right of those synods to be represented in the assembly. The court decided that the legislative acts of the Assembly were in accordance with the laws and rules of the Presbyterian church; and that, whether so or not, the choice of moderator was illegally made,— that is, contrary to the laws and usages of that denomination and general parliamentary law, and the election of the first (new school) trustees was vacated.

In 18 Verm. 511, *Smith* v. *Nelson*, the court set aside a long series of decisions of synods and presbyteries as irregular, and established the right of the plaintiffs to a legacy payable to the church for the use of its pastor.

From these decisions it is clear, that whenever there is a public or private right to be vindicated, the courts are not deterred from vindicating it by the fact that they must incidentally pass upon the legislative or judicial action of ecclesiastical bodies.

In England, where, as I have said, there are legal tribunals to enforce ecclesiastical laws, and, therefore, greater objections to the intervention of the common law courts, still the common law courts have often passed upon the duties and decisions of ecclesiastical tribunals and officers.

Blackstone says distinctly (3 Com. 110) that mandamus lies to restore to "an office or franchise of a public nature, whether spiritual or temporal." Lord Mansfield says, 3 Burrows, 1646: "so they will do in ecclesiastical cases, where it appears there is no other remedy." Writs of mandamus have been issued to bishops, commanding them to restore a prebend, 2 Strange, 1082; 5 Com. Dig. A.; a chaplain, 2 Str. 797, *R.* v. *Bishop of Chester;* a register, 2 Str. 893; a churchwarden, 2 Rolle's Abr. 106; 5 Com. Dig. A.; requiring them to absolve excommunicated persons, 5 Com. Dig. A.; 16 Ves. Jr. 346, *Boraine's* case; to baptize, 2 Rolle's Abr. 106; to receive a will to probate, 1 Raymond, 235; 1 Sid. 281; 2 Sid. 112; and in the late case of *Dr. Hamden*, which arose on application for a writ of mandamus to the archbishop of Canterbury, to compel him to hear objections before consecrating a bishop, the court and counsel on both sides agreed that the writ of mandamus was the appropriate remedy, and the case turned on another point.

In *Beaurain* v. *Scott*, 3 Camp. 387, the plaintiff recovered against Sir Wm. Scott, acting as vicar for the bishop of London, for having excommunicated him; the ground of excommunication not being held sufficient in law. When (in 16 Ves. 346) a motion was made for a writ, in the same case, against the bishop, commanding him to absolve Mr. Boraine,[1] Lord Elden, after full consideration, thought it could be granted where the cause of excommunication was not sufficient. Yet this was a high judicial act of the bishop, confessedly within his jurisdiction.

Writs of prohibition were constantly granted against bishops and archbishops, whenever they exceeded their jurisdiction; as well as writs of habeas corpus in favor of parties held under writs of *excommunicato capiendo*, to try the question of jurisdiction. 1 Salkeld, 293–4, *R.* v. *Fowler*, *R.* v. *Hill*, *R.* v. *Bishop of St. David's*, &c. &c.

Where relief by mandamus in ecclesiastical cases has been refused in England, the ground has been either that there was another direct and adequate remedy, or an appeal, or a visitor (which is the same thing in substance),

[1] *Sic* in Vesey.

or that the case was one of discretion, or that the decision of the ecclesiastical tribunal was impeached only on the facts. 1 T. R. 331, *R.* v. *Bishop of Norwich;* 5 T. R. 713, *R.* v. *Croydon;* 1 Wils. 11, *R.* v. *Bishop of London;* 5 Com. Dig. 26, 27. In the case of a proctor in the ecclesiastical courts, it was long doubted. *Lee's* case, reported variously in Skinner, 290; Carthew, 169; and 3 Mod. 332; 1 Shower, 217 and 252; and 3 Levinz, 309.

These reports, as well as the reasons given in the case of the proctor, are unsatisfactory, and would probably be of little weight since Mansfield's time. In 3 Mod., a reason given is that there is an appeal, which would be conclusive; and, according to 1 Shower, 252, Lord Holt thought a mandamus would lie; and in Bacon's Abr., "Mandamus C," p. 529, the granting of the writ in case of a register seems to have settled the principle.

As the writ will not be issued if it will be evidently ineffectual, as in the case of a short term of office, *Howard* v. *Gage*, 6 Mass. 462, it was doubted whether it should be issued in a case of suspension, 1 Lev. 162, the court being divided; but it has since been decided that it will lie. Bacon's Abr., "Mandamus C," p. 535. The question is probably one of discretion, depending upon the term of office and the length of the suspension. In the present case, the suspension is for an indefinite time; being until Mr. Prescott shall do an act which, he contends, cannot be required of him, and which it would be unlawful for him to do, by the law of his church.

It is understood that, in this case, Mr. Prescott has no right of appeal.

In the present case, therefore, the following points seem made out:

1. The office is one of public concern.
2. The petitioner has a valuable interest in his office.
3. He has no other remedy.
4. The writ is appropriate, because he does not ask for a re-examination of the merits or of any question of discretion, but only a decision whether the sentence is one which, by the law of the Episcopal Church, it is competent for the bishop to pronounce.

It is my opinion, upon a full consideration of the question, that the writ ought to be granted. On the return to the writ, the legality of the sentence will be tried.

August 31, 1852.

Recent American Decisions.

Circuit Court of the United States for the District of Massachusetts. May Term, 1855.

KILBY PAGE, APPELLANT, *v.* HENRY L. SHEFFIELD, LIBELLANT.

Shipping articles — Misdescription of voyage — Parol evidence — Seamen.

A mariner may allege and prove that the shipping articles do not truly describe the voyage for which he was shipped, and may recover wages upon the ground that the voyage for which he contracted was different in length from that described in the articles, and that he was wrongfully discharged at the expiration of the voyage specified in the articles; and a mate is within the same rule.

CURTIS, J. — This is an appeal from a decree of the district court, pronouncing for wages of the libellant as mate of the ship Uriel, on a voyage from San Francisco to Calcutta, and thence to Boston. The libellant shipped at San Francisco, and there signed articles which described the voyage to be from San Francisco to Calcutta. There is no question that the seamen were shipped for the run, and that the articles correctly describe their voyage. The master, the libellant, who was first officer, and the second and third officers, all signed the same articles. At Calcutta the master discharged the libellant against his will, and the district court allowed wages as for the entire voyage to Boston. Two questions have been made on this appeal. 1st. Whether oral evidence of a contract different from that contained in the articles is admissible. 2d. Whether, if such evidence be admitted, it is proved that the libellant shipped to go from Calcutta to Boston, as well as from San Francisco to Calcutta.

Two views may be taken under the first question. The first is, that there were two distinct subjects of agreement; the one being service on a passage from San Francisco to Calcutta; and the other, service from the latter place to Boston; that the master had engaged seamen to perform the first-mentioned voyage only; that the articles were designed to apply only to that passage, as a distinct voyage; and that the contract for the service of the libellant,

though made at San Francisco for the other voyage from Calcutta to Boston, was left in parol, to be reduced to writing at Calcutta when articles should be signed there by the seamen who might there ship for the voyage home. In this point of view, the articles not being designed to contain the contract for the second voyage, and that being a separate contract, parol evidence of it would be admissible, though it were made at the same time as the other contract for the voyage described in the articles. *M'Culloch* v. *Girard*, 4 Wash. C. C. 290; *Seago* v. *Deane*, 4 Bing. 459; *Lapham* v. *Whipple*, 8 Met. 59.

Now, the act of congress of July 20, 1790, for the government and regulation of merchant seamen, requires the agreement in writing to declare the voyage or voyages for which the mariner shall be shipped; and, if carried out without such a written contract, besides being made liable for the highest rate of wages paid for three months previous, &c., a penalty of twenty dollars for each seaman or mariner is inflicted.

Yet, assuming what we must assume in considering the admissibility of this evidence, that it would prove that the services of the libellant were engaged, not only for the passage to Calcutta, but also for the passage thence to Boston, we have a case where the master must either take the ground that two distinct contracts were made, or else that he broke the law, and carried the libellant to sea without a contract in writing describing the voyage for which, in point of fact, he was shipped. If the case necessarily rested here, I should be very reluctant to allow the master, or the owner, to assume such a position; and if the parol evidence, when examined, would admit of such an interpretation, as to show two distinct contracts for two voyages, or that, though only one contract was originally made, it was severed by the acts of the parties in signing the articles to adapt it to the contract of the seamen to serve from San Francisco to Calcutta, I should certainly lay hold of that interpretation as the one which reconciled the conduct of the master with the requirements of good faith and of positive law.

But there is another ground on which I think the evidence clearly admissible. Assuming, what is still to be assumed to test the admissibility of the evidence, that there was but one contract, for an entire voyage from San Francisco, by way of Calcutta, to Boston, then the written articles did not describe the voyage on which the libellant

went to sea, and the master was prohibited by law, under a penalty, from taking him to sea under such articles. Parol evidence is always admissible to impeach a contract by showing it to be made in violation of law. It is competent for the libellant to show by parol that these articles do not declare the voyage or voyages for which he was shipped, and that they thus violate the law; and when this has been shown, the written contract is no longer binding as respects the description of the voyage. If it were, the master would be allowed to take advantage of his own wrong; for it is his own wrong that the voyage is falsely described, and he cannot first violate the law by making a false description, and then set it up to estop the libellant from proving the true one.

I am aware that in *White* v. *Wilson*, 2 B. & P. 116, ELDON, C. J., expressed an opinion that a perquisite, claimed by the mate in addition to his wages, which was not specified in the articles, could not be recovered; and that similar decisions were made in the *Jack Park*, 4 Rob. 314, the *Isabella*, 2 Rob. 241, the *Prince Frederic*, 2 Hag. 394, and by Judge HOPKINSON in *Veacock* v. *M'Call*, Gilpin, 329. But the English statute, unlike ours, does not inflict any penalty for a failure to reduce the seaman's contract to writing, and is a kind of statute of frauds merely. It is directory to the seamen, commanding them to sign articles, and does not, like ours, make it the duty of the master to have a contract in writing prepared, declaring the voyage. In the *Prince Frederic*, 2 Hag. 394, Sir C. ROBINSON declared the statute was intended for the protection of the owner. (See also the *Isabella*, 2 Rob. 241; the *Jack Park*, 4 Rob. 314.) The 7 & 8 Vic. c. 112, which is the present English law on this subject, seems to have been framed with a view to the protection of seamen, as, I have no doubt, these provisions of our acts of 1790 and 1840 were.

In the case before Judge HOPKINSON, Gilpin, 329, he seems to have followed the English decisions, as the supreme court of New York appear to have done in *Bartlett* v. *Wyman*, 14 John. 260, and *Johnson* v. *Dalton*, 1 Cowen, 543, without considering whether the diversity between the English and American statutes should lead to diverse conclusions.

It should be observed, however, that in all these cases the question was, whether the articles are conclusive as to the rate of wages, respecting the insertion of which in the

articles the act of congress contains no express requirement, as it does as to the description of the voyage.

The act of July 20, 1840 (art. 10), provides that all shipments of seamen, made contrary to the provisions of this and other acts of congress, shall be void; and any seaman, so shipped, may leave the service at any time, and demand the highest rate of wages paid to any seaman shipped for the voyage, or the sum agreed to be given him at his shipment.

I do not understand the effect of this, either standing alone or taken in connection with the act of 1790, to be that the master may discharge a seaman or officer at any time, if he has not signed such articles as the act of 1790 requires. The seaman has the right either to continue the voyage or leave the service. If he does continue, or is ready to continue, and is prevented by the master, he is to be paid either the wages agreed on, or the highest paid to any seaman shipped for the voyage. But it seems to be the necessary consequence of this provision of law, that if the written articles made a shipment contrary to the act of 1790, by misdescribing the voyage, they are void, and, of course, cannot be set up for any purpose by the master or owner. It is true the third article in this act of 1840 declares that the certified copy of the shipping articles, to be obtained by the owner from the collector before sailing, shall be deemed to contain all the conditions of contract with the crew as to their service, pay, voyage and all other things; but by whom, and under what circumstances, is this copy so to be deemed? I am of opinion, only for the purposes and upon the occasions described in the same articles; that is, when laid before a consul, in a foreign port, when he may deem the contents necessary to enable him to discharge his duties. In a court of admiralty, the fact that the seaman was deceived as to the contents of the articles, that they contain what is unreasonable, or oppressive, or unlawful, that they were made in violation of an act of congress, and so are not binding, are all open to inquiry, and are not affected by this provision as to what the certified copy of the articles shall be deemed to contain.

Being of opinion that oral evidence is legally admissible, I have looked into and considered it, and find that it proves the services of the libellant were contracted for, not only on the passage from San Francisco to Calcutta, but also thence to Boston or some port in the United States;

that the discharge of the libellant at Calcutta was therefore wrongful, and the decree of the district court is affirmed, with damages at the rate of six per centum per annum and costs.

F. H. Allen, for the appellant.

R. H. Dana, jr., and *Geo. S. Hale, contra.*

Vice-Admiralty Court — Lower Canada.

Friday, October 12, 1855.

THE VARUNA.

Seamen — Wages — Shipping articles — Description of voyage — British Mercantile marine act of 1850 *— Merchant shipping act of* 1854.

Where seamen shipped for "a voyage from the port of Liverpool to Constantinople, thence (if required) to any ports or places in the Mediterranean or Black seas, or wherever freight may offer, with liberty to call at a port for orders, and until her return to a final port of discharge in the United Kingdom, or for a term not to exceed twelve months," and the ship went to Constantinople in prosecution of the contemplated voyage, and then returned to Malta, whence, instead of going to a final port of destination in the United Kingdom, she came direct to Quebec in search of freight, which she had failed to obtain at the ports at which she had previously been, it was *held*, that coming to Quebec could not be considered as a prosecution of the voyage, under the 94th section of the British mercantile marine act of 1850, re-enacted by the 190th section of the British merchant shipping act of 1854.

THE facts in this case appear in the opinion of the court.

Hon. HENRY BLACK. — Three suits for wages having been instituted by seamen against the ship Varuna, before two justices of the peace for the district of Quebec, the cases have been by the justices referred to be adjudged by this court. These cases turn purely upon the question whether the men are, under the ninety-fourth section of "The mercantile marine act, 1850," or the one hundred and ninetieth section of "The merchant shipping act, 1854," entitled to sue for their wages on the ground that the voyage for which they engaged, and their engagement, have been terminated by the ship's having, as they allege, abandoned the voyage mentioned in the articles of agreement, and commenced another voyage for which they had not agreed. The articles are dated the 29th of March,

1855, and the part material to the present case is in the following words: — "The several persons whose names are hereto subscribed, hereby agree to serve on board the said ship in the several capacities expressed against their respective names, *on a voyage from the port of Liverpool to Constantinople, thence (if required) to any ports or places in the Mediterranean or Black seas, or wherever freight may offer, with liberty to call at a port for orders, and until her return to a final port of discharge in the United Kingdom, or for a term not to exceed twelve months.*" The ship went to Constantinople in prosecution of the contemplated voyage, and then returned to Malta, whence, instead of going to a final port of destination in the United Kingdom, she came direct to Quebec in search of freight, which she had failed to obtain at the ports at which she had previously been.

The ninety-fourth section of the mercantile marine act, 1850, is in the following words: — "No seaman who is engaged for a voyage or engagement which is to terminate in the United Kingdom shall be entitled to sue abroad for wages, in any court or before any justice, unless he be discharged in the manner required by the general seamen's act, and with the written consent of the master, or proves such ill-usage on the part of the master, or by his authority, as to warrant reasonable apprehension of danger to the life of such seaman by remaining on board; but if any seaman, on his return to the United Kingdom, proves that the master or owner has been guilty of any conduct or default which, but for this enactment, would have entitled the seaman to sue for wages before the termination of the voyage or engagement, he shall be entitled to recover, in addition to his wages, such compensation, not exceeding twenty pounds, as the court of justice hearing the case may think reasonable." This provision is also repeated in the merchant shipping act, 1854, which came into operation on the first of May last. The contract being dated before that day, must, I think, be considered with reference to the former, though it would, in law, make no difference, as the words of the two acts are the same.[1]

If the ship's coming to Quebec can, under the act, be considered as a prosecution of the voyage under which these men shipped, then they are not entitled to sue here,

[1] 13 & 14 Vic. cap. 93, § 94; and 17 & 18 Vic. c. 104, § 190.

and the case must be dismissed. If, on the contrary, the ship's coming to Quebec cannot be held to be a prosecution of such voyage, then the voyage for which they engaged is at an end by the act of the master or owners, and they must recover.

The language used by the legislature with regard to the description of the voyage which must be inserted in the shipping articles, has been altered several times in the successive acts; but the words of the mercantile marine act, 1850 (13 & 14 Vic. cap. 93), which was in force when the contract was entered into, are, that the articles shall mention "the nature, and as far as practicable the length, of the voyage or engagement on which the ship is to be employed." The law which came in force on the first of May last (17 & 18 Vic. cap. 104), but which does not, however, legally apply to these cases, is nearly the same. It requires that the agreement shall contain "the nature, and as far as practicable the duration, of the intended voyage or engagement." A voyage is a technical phrase, and imports a definite commencement and end. In the present case, the commencement was Liverpool, and the end a final port of discharge in the United Kingdom. But the act also requires that the nature of the voyage be stated, and, in compliance with this requirement, it is described in the articles as to Constantinople, thence, if required, to any ports and places in the Mediterranean or Black seas, or wherever freight might offer, with liberty to call at a port for orders, and until her return to a final port of discharge in the United Kingdom; and as the act also requires that, as far as practicable, the length of the voyage or engagement on which the ship is to be employed should be mentioned, the articles state a term not to exceed twelve months. The nature of a voyage undoubtedly consists in the place or places to which it is intended to be made; and the instrument, in the present instance, must be construed with reference to the description of the voyage given in it, as well as to the term of twelve months, to which that voyage is to be limited. This term must be construed as a further limitation to the description of the voyage, and not as an alternative substituted for the previous description of its nature, authorizing a voyage to any part of the globe to and from which the ship could go and return in twelve months. To construe it as such alternative would be to nullify the previous description of the nature of the voyage, which the act requires, as well

as its probable length; showing clearly the intention of the legislature that the nature of the voyage was a thing perfectly distinct from its mere length, and that both length and nature were of the essence of the contract, and must be stated. Now, I cannot think that a voyage to Quebec, through the gulf of St. Lawrence, in the northwestern parts of the Atlantic Ocean, can be considered to be part of a voyage to a port or ports in the Mediterranean or Black sea, in the southeastern parts of another quarter of the globe.

The words, "or wherever freight may offer," are to be construed with reference to the previous description of the voyage, and must be considered as meaning any ports or places in the two seas named in the articles, or some place in their immediate neighborhood, or between them and the United Kingdom. Lord STOWELL'S expressions, in commenting upon the application of the words "or elsewhere" in a parallel case, are remarkably apposite. He observes, that he has no hesitation in asserting that they are not to be taken in that indefinite latitude in which they are expressed; they are no description of a voyage; they are an unlimited description of the navigable globe, and are not to be admitted as a universal alibi for the whole world, including the most remote and even pestilential shores, indefinite otherwise both in space and time; they must receive a reasonable construction, which must be, to a certain extent, conformable to the necessities of commerce. The word "elsewhere" must, in its construction, vary much, according to the situation of the primary port of destination; if it is applied to a country remote from all neighboring settlements, it is entitled to a larger construction; if to one that is surrounded by many adjacent ports, the limitation would be much narrowed; and I cannot help observing here, that the captain has deprived himself of an extensive latitude by describing the primary port to be in the neighborhood of many adjacent ports which could supply cargoes.[1] It appears to me that no reasoning can be more conclusive than this; and thinking, as I do, that the voyage of the Varuna to Quebec is one which cannot come within the description of the intended voyage for which the men agreed, but is a departure from that voyage, and the substitution of a new and perfectly different one, by which departure and substitution the

[1] *The Minerva*, 1 Hagg. 361.

contract between them and the master is terminated, I am of opinion that the men are entitled to recover their wages at this port, and I accordingly over-rule the protest of the master by which their right so to recover has been contested.

Charles Alleyn, Esq., for the seamen.

Richard Pope, Esq., for the ship.

Supreme Judicial Court of Maine. Lincoln County. 1855.

PARSONS *v.* HUFF.

Separation of jury — Waiver — Leading questions — Objections to depositions — Deponent's oath — Magistrate's certificate.

A verdict will not be disturbed on account of the temporary absence of a juryman from the jury room, when the parties have not misbehaved and there is nothing in the transaction which gives reason to suspect the purity of the verdict.

And if such absence be known, and an opportunity afforded to take the objection before the verdict, and it is not taken, it is waived.

Any question by which the fact is made known to the witness, which the interrogator wishes to find asserted in his answer, is a leading question. It is none the less leading because the alternative form of expression is used; as, "Did you, or did you not?"

Circumstances under which leading questions may be allowed.

If allowed, it is no ground for a new trial, as it is a matter of discretion on the part of the presiding judge.

Under the Maine Rev. Stat. c. 133, § 20, an objection for matter of form to a question put to a deponent must be sufficiently clear and precise to enable the adverse party to remove it. If general, the objection cannot on trial avail the party taking it.

In Maine the oath must be administered to a deponent before his testimony is given. An oath administered after is ineffectual.

The oath must be to testify, &c., "*relating to the cause or matter for which the deposition is taken*," and a magistrate's certificate omitting these words is fatally defective.

THE questions determined in this case sufficiently appear from the opinion of the court.

APPLETON, J. — It appears that one of the jurymen, being very ill, was permitted by the court, during its adjournment, to leave the jury room for a short time, and retire to his lodgings; that upon the coming in of the court at the hour of adjournment, the remainder of the jury, by consent of parties, separated for the purpose of obtaining breakfast; that they then, with the absent jury-

man, returned into court, and, after receiving additional instructions, retired to their room and found the verdict which the counsel for the defendant now moves to set aside on account of the absence of a sick juryman, under the circumstances already stated.

1. It has sometimes happened that a juryman, through ignorance and misapprehension of his duty, has separated from his fellows without the permission of the court. In *Burrill* v. *Phillips*, 1 Gall. 360, an application was made to set aside a verdict for this cause; but the court held it as being a matter of discretion, and that where no misconduct appeared on the part of the juryman, and his absence was the result of mistake, that a verdict should not be set aside for such cause. In *Smith* v. *Thompson*, 1 Cow. 221, two jurymen separated from their fellows, and were absent some hours, but returned and joined in the verdict. As there was no misconduct shown on the part of the jurymen save that of leaving, and no imputation on the successful party, the court refused to interfere with the verdict. In *Crane* v. *Sayre*, 1 Hals. 110, the court say, "A verdict is never to be set aside for a juror's misbehavior to the court, unless it is prejudicial to one or the other of the parties, and no such thing appears in this case." In *People* v. *Douglas*, 4 Cow. 26, SAVAGE, C. J., remarks that, "in a civil suit at this day, it is perfectly clear that a separation of the jury without, and even contrary to, the direction of the court, would not of itself warrant us in setting aside their verdict." In *Ragland* v. *Will's Adm'r.*, 6 Leigh, 1, it was held, when two jurymen had separated from their fellows without consent of court, that it afforded no cause for setting aside the verdict. An elaborate opinion was given by CARR, J., in which all the antique lore of the law was thoroughly explored, and the question most elaborately discussed. The result of all the authorities is clearly expressed by TUCKER, President of the court of appeals, in the following language: "When the parties have not misbehaved, there seems no good reason why they should be exposed to the expense and vexation of a new trial on account of the misbehavior of the jury, if there is nothing in the transaction which gives reason to suspect the purity of the verdict." In *Newell* v. *Ayer*, 32 Maine, 334, it was held to be misconduct on the part of a juryman to leave the panel without consent of the court, but that if no injury resulted therefrom the verdict should not be disturbed.

The grounds upon which the court refuse to act in cases of this description, is that the losing party is not known to have suffered in any respect. In this case no wrong is imputed to the juryman or to any one. If a juryman from sickness, but with the permission of the court, should leave the jury room for a short time, it is not easy to perceive why a more stringent rule should be adopted than when his absence is without such necessity or permission, and is the result of ignorance. If the grounds assumed by the counsel for defendant were correct, that the court had no legal right to grant leave of absence except in open court, and that the juryman must leave in charge of an officer, then this must be regarded as the case of a juryman's having absented himself without authority, and, upon the decisions already referred to, the motion cannot prevail.

But the objections arising from the temporary absence of the juryman must be regarded as having been waived. After he had left the jury room, and while he was absent, the remainder of the jury came into court, and by consent of parties temporarily separated. Upon their return, being joined by the absent member, additional instructions were given. The jury then retired, and after a short absence returned and rendered their verdict. All this was done by consent, expressed or implied, and without the interposition of any objection. If the counsel had intended to have relied on the ground now taken, it should have been seasonably disclosed. He should not be permitted to lay by, and run his chance for a verdict, and then, finding it adverse, claim to have it set aside. If the objection has any foundation, it is taken too late.

2. Any question by which the fact is made known to the witness, which the interrogator wishes to find asserted in and by his answer, is a leading question. It is none the less leading because the alternative form of expression is used; as, "Did you, or did you not?" &c. *People* v. *Mather*, 4 Wend. 247; *Hopper* v. *Commonwealth*, 6 Gratt. 684. The questions proposed in numerous depositions are liable to this exception, and the question arises whether this furnishes any sufficient ground for setting aside the verdict.

The end proposed in extracting testimony, is to obtain the actual recollections of the witness, and not the allegations of another person, adopted by the witness, and falsely delivered as his. It is obvious that suggestive interroga-

tion leads to the despatch of business, and that sometimes it may be absolutely necessary to recall the attention of the witness to facts which had passed from his memory. This is objectionable mainly when, on the part of the interrogator, there is a disposition to afford information for the purpose of eliciting a false answer, and a corresponding design on the part of the witness to make use of it for such sinister purpose.

The accidental presence of an individual at a transaction which subsequently becomes a matter in litigation, and the consequent necessity of calling him as a witness, would hardly seem to afford any sufficient reason to believe that he would be under any bias which would affect the trustworthiness of his testimony. The rule that a party shall not propose leading questions to his own witness, rests principally upon a loose use of the possessive pronoun; for if the witness is without prejudice in favor of either party, and if there be any serious evils likely to arise from suggestive interrogation, they would in such case equally occur whether this mode of examination were adopted by the party calling him or by his antagonist. The rule "was based," says PURPLE, J., in *Greenup* v. *Stoker*, 3 Gilman, 202, "upon the supposition that witnesses were inclined to favor the party by whom they were called, and to testify in his favor if they could but receive an intimation of his wishes. It would be but charitable to conclude that the necessity which introduced the doctrine has for a long time ceased to exist."

It cannot but happen that the witness called may frequently be adverse in feeling or interest to the party by whom he is called; or that, if not thus adverse, a suggestion may be necessary to bring back to his recollection a true matter which was really there before. The rule is, therefore, not without its exceptions, and the court in their discretion allow more or less latitude as to the questions proposed and the suggestions made, as the witness is willing or unwilling, is spontaneous or evasive in his answers, is forgetful or of a tenacious memory.

The appearance and manner of the witness, the readiness or reluctance of his answers, his relation to the parties, as apparent from his examination, afford a basis to determine. They may justify or authorize the allowance of interrogation, *ex adverso*, by the party producing him. If, then, leading questions are allowed, as their allowance is a matter of discretion on the part of the presiding judge,

it is no ground for a new trial. *Stratford* v. *Sanford*, 9 Conn. 275; *West* v. *State*, 2 Zab. 212. In *Greenup* v. *Stoker*, 3 Gilman, 211, the court remarks, that "seldom if ever has it been considered that a mere practical error in this respect would afford even the slightest grounds for a new trial, or to reverse a cause for error." The same question arose in *Hopkinson* v. *Steel*, 12 Verm. 582, and a similar doctrine was affirmed. In *Woodin* v. *The People*, 1 Park. Cr. Cases, 465, the form of a question was a matter of discussion with the court, and with a similar result.

In *Blevins* v. *Pope*, 7 Ala. 371, ORMOND, J., says "that when a witness manifests a leaning, &c., the court will permit leading questions to be put. It is clear that this is a matter within the discretion of the court, from the impossibility in most cases of putting the facts on the record so that they may be reviewed. It results from this that the presiding judge need not state his reasons for permitting a leading question to be put upon the examination in chief, as they would be more conclusive, and not facts susceptible of revision." "In general," remarks Lord Ellenborough, "no objections are more frivolous than those made to questions as leading." *Nichols* v. *Downing*, 1 Stark. 81. "It is in the discretion of the judge how far he will allow the examination in chief of a witness to be by leading questions, or, in other words, how far it shall assume the form of a cross examination." *Regina* v. *Murphy*, 8 C. & P. 297.

Indeed, the only case where it has been distinctly and fully determined that it was a good cause for a new trial, because a leading question was proposed and answered, is *Turney* v. *State of Mississippi*, 8 S. & M. 104. But, upon a careful examination of the authorities, the conclusion is that the permission of a leading question by the presiding judge, being a matter resting purely in discretion, affords no ground for a new trial.

3. But the question is somewhat different when the testimony is in depositions. It is true the bias of the witness may be then perceived, but not so readily as when his examination takes place in the presence of the court. It has, nevertheless, been held, in *Cope* v. *Sibley*, 12 Barb. 521, that the same discretion exists on the part of the court to receive or reject the answers to leading questions as on a personal examination at the trial. The rights of the parties in this case, however, depend on statutory provisions.

The twentieth section of the Revised Statutes, chap. 133, is not clearly expressed, and there is an apparent contradiction between its different parts which it is not easy to reconcile. "Objections to the *competency* of a deponent, or the *propriety* of any *question proposed* to him, or *answers given by him*, may be made when the deposition is produced, *in the same manner as if the witness was personally examined on the trial;* but when any deposition is taken on *written interrogatories*, all objections to any interrogatory *shall be made before it is answered;* and if the interrogatory *be not withdrawn*, the objection shall be noted thereon; otherwise the objection shall not *afterwards be allowed*."

It was not the design of the legislature that there should be any conflict between the first and last clause of this section, and such a construction should be given to the whole as will reconcile all its parts. In the first clause, the "questions proposed," equally with "the answers given," must be reduced to writing, else the court would not be able to determine their propriety. In the latter clause, they are expressly designated "written interrogatories." Now, where the statute says that "all objections to any interrogatory shall be made before it is answered," it cannot relate to *all questions proposed*; because, by the first clause, there is a class of questions to which objections may be made where the deposition is produced, "in the same manner as if the witness were personally examined on the trial." To the questions referred to in the first clause, no objection, special or otherwise, is required. It is clear that the party proposing interrogatories must be present, else he could not know the objections taken, and withdraw and modify them, if he should see occasion for so doing. As to certain questions, no objections need be taken; as to others, all objections must be taken. It is obvious that the latter clause in this section refers to a class of objections not included in those referred to in the first clause. There are questions, then, which need not be objected to till the deposition is produced in the trial, and there are objections which must be taken and noted at the caption of the deposition, else the right to object is regarded as lost.

The objections specified in the first clause must refer only to matters of substance,—the competency of the witness,—the legal propriety, the legal admissibility, of the subject-matter to which the question relates, as whether relevant or not to the matter in issue, whether hearsay, &c.

The objections specified in the latter refer to such things as are purely technical and formal, as whether the questions are leading or not. In the case at bar, the specific ground of objection does not distinctly appear. All that we know is, that they were objected to; but as to why or wherefore the objection to the inquiries was taken the deposition is silent. In *Cleaves* v. *Stockwell*, 33 Maine, 341, the question objected to was stricken out, because it was leading. Whether the specific ground of objection to it as leading was taken at the time of the caption, does not distinctly appear. But it should appear, so that the party examining may, if satisfied the objection is well founded, withdraw or so modify the question that it shall no longer exist. Such was the law before the Revised Statutes, and we cannot believe it was the intention of the legislature to make any changes in this respect. *Rowe* v. *Godfrey*, 16 Maine, 128; *Polleys* v. *Ocean Ins. Co.*, 14 Maine, 141; *Potter* v. *Leeds*, 1 Pick. 309. As the objections taken were general, they cannot now avail the party taking them. They should have been sufficiently clear and precise to enable the adverse party to remove the ground of objections, if it was one of form merely.

4. By the certificate of the magistrate, it appears that Quincy A. Parsons, "*before* testifying, was sworn to testify the truth, the whole truth, and nothing but the truth; and, *after* giving the aforesaid deposition, was duly sworn, *according to law*, to said deposition," &c. If the certificate of the magistrate is correct, the witness was sworn twice, — once before and once after giving his testimony. The R. S., c. 133, § 15, require but one oath, and that before the testimony is delivered. The fact, therefore, that the witness was sworn after giving his depositions, cannot enlarge the rights of parties, or make that legal which otherwise would be illegal. *Atkinson* v. *St. Croix Man. Co.*, 24 Maine, 171; *Erskine* v. *Boyd*, 35 Maine, 511. The oath, as administered, varies from the requirements of the statute, by omitting the words, "relating to the cause or matter for which the deposition is taken." The magistrate, by his own showing, has not complied with the requirements of the statute. He has sworn the witness to testify to the truth generally, and in reference to all matters, not specially to the cause or matter for which the deposition was to be taken. The oath required by the statute is so framed as particularly to direct the attention of the witness to a single or specific subject-matter, — "the cause of

matter for which the deposition is to be taken." The oath, as administered, entirely fails in doing this.

Chapter 188, § 19, of the Revised Statutes of New Hampshire, regulating depositions, provides that every witness "shall make oath that such deposition contains the truth, the whole truth, and nothing but the truth, *relative to the cause for which it was taken.*" In *Fabyan* v. *Adams*, 15 N. H. 371, a certificate of the magistrates, in the caption, that the witness, "after being duly cautioned, and sworn to tell the truth, the whole truth, and nothing but the truth, subscribed and made oath to the foregoing depositions," was held defective, because of the omission of the words, "*relative to the cause for which they were taken.*" The court in that case held that the certificate of the magistrate failed to show that the oath required by the statute had been administered.

Nor is this all. The certificate of the magistrate has been deemed sufficient proof of the administration of the oath, as set forth therein, to sustain an indictment for perjury. "The courts," remarks ABBOTT, C. J., in *Rex* v. *Spencer*, 1 C. & P. 260, "always give credence to the signature of the magistrate or commissioner, and if his signature is proved, that is sufficient evidence that the party was duly sworn; and if the place at which it was sworn is mentioned in the jurat, that is sufficient evidence that he was sworn at that place." The same doctrine is affirmed in *Regina* v. *Turner*, 2 Car. & Kir. 735, where it was held by ERLE, J., that proof of the handwriting of the party sworn and of the officer authorized to administer the oath was sufficient evidence that the affidavit was sworn before him, and that he was so properly sworn.

Now, in an indictment for perjury, a material allegation is, that the witness was duly sworn and took his oath before A. B., &c., to speak the truth, the whole truth, and nothing but the truth, *touching the matters in issue on the said trial*," the indictment having previously set forth the parties litigant and the court before whom the trial was had, in which the offence was committed. Davis' Precedents, 20. The English precedents allege the oath to have been taken to speak "the truth, the whole truth, and nothing but the truth, *touching and concerning the matters then in question between the two parties.*" 2 Chitty, Cr. Law, 351; 3 Archbold, Cr. Pr. 601. It must not only appear that the magistrate had competent jurisdiction to administer the oath, but that it was duly administered.

So, if the indictment were for perjury in a deposition, the indictment should allege that the deponent was sworn to testify the truth, the whole truth, and nothing but the truth, "relating to the cause or matter for which the deposition was taken."

To constitute the crime of perjury, it is essential that the testimony in relation to which the perjury is charged should be material in the cause in which it is alleged to be committed. But if it does not relate "to the cause or matter" tried, it cannot be material. If the oath taken does not apply to "the cause or matter" tried, and in which the perjury is alleged, it is difficult to perceive how the offence has been committed, or how the person, though testifying falsely, can be punished.

It is apparent, therefore, that the certificate of the magistrate would not afford proof sufficient to sustain an indictment against a deponent for perjury.

In accordance with the decision of this court in *Brighton* v. *Walker*, 35 Maine, 132, as the certificate of the magistrate does not show that the oath required by statute has been administered, the deposition of Parsons must be regarded as having been improperly admitted, the objection having been particularly pointed out at the time, and the attention of the court having been called to its consideration.

It is to be regretted that a verdict should be set aside for an error of the magistrate, which might have been amended at the trial, but the requirements of the statute cannot be disregarded.

Exceptions sustained. New trial granted.

Shepley, C. J., Rice, Cutting, JJ., concurred.

Supreme Court of Vermont. Washington, ss. April Term, 1855.

Davis *v.* Goodnow.

Action for services by a child, &c., to a parent, or one in loco parentis, when maintainable.

Where services are rendered by a child or other relative living in the family of the parent, or of a person occupying the place of a parent to such person or parent, even after its majority, no action can be maintained for such services, unless it unequivocally appears that the parties

at the time of the service were dealing as debtor and creditor, and that the services were rendered for wages and not for support, or in expectation of a gratuity or legacy.

A general assurance that liberal compensation should be given, without saying in what mode, is insufficient.

The facts in this sufficiently appear from the opinion of the court by

Redfield, C. J. — In this case the action is brought by a grandchild to recover for services rendered to her grandfather while she constituted a member of his family, where she was principally brought up, her father having died when she was a child, and left the family poor. The plaintiff's mother being a child of defendant, he took an interest in the family, and rendered them assistance. The services were all performed after she became of age, and had gone abroad to work for herself, and returned at defendant's request, with the assurance she should be paid as well as she was then doing. This was substantially repeated a good many times during some three years while plaintiff continued mostly in defendant's service, much as before she was of age, rather as a member of the family than a servant. No reckoning of wages or account on either part was ever had or kept, nor was any claim ever made by the plaintiff for pay, or that anything was due her when she left the defendant, or when she was in distress for money to get home, or in New Hampshire, the second time she left him; or when she was married; or when the defendant distributed his property, as he did most of it, it would seem, before his death, giving some to plaintiff's mother, and some to her children.

Under this state of the facts, the case seems to us the ordinary one of a child, or other relative, living in the family of the parent, or one occupying that place, after they come of age, with the assurance they shall be liberally compensated, without saying in what mode, and with no definite expectation that either the service or support shall create a debt; in which case it is well settled that neither can sustain an action against the other for any excess of the real value of the one above the other.

We think the rule laid down by this court in the cases cited in argument is not to be departed from, viz. that it must appear unequivocally that the parties, at the time of the service, supposed they were dealing as debtor and creditor that the service was for wages and not for support, or in expectation of a gratuity or a legacy. The judgment

which was rendered in *Andrews and Wife* v. *Foster*, for a fragment of the service, was upon the ground that the parties seemed to have considered that service as performed for wages, the defendant having already paid her thirty dollars in money towards her wages, as the auditor reported, before she left; while here the plaintiff left repeatedly, and other events occurred imposing upon her the strongest motive for making a demand of wages, if she deemed herself entitled to any, and she made no such claim. And so in the late case of *Noy* v. *Noy*, in Orleans county, the report showed unequivocally that the defendant recognized the service as a pecuniary debt, naming the sum of two thousand dollars as the probable amount. But, in the present case, there is nothing to show that the parties so regarded it, unless it was to be inferred from the circumstances and the kind of service. And if there is any force in these, the inferences should be made by the auditor to whom they were addressed. And as we are inclined to give the plaintiff every reasonable chance of making out her case, the judgment will be reversed and the case recommitted, that the auditor may report whether there is anything in the case which shows satisfactorily that it was the expectation of the parties, at the time the service was performed, that it created a debt, or that the plaintiff should have wages. This is the very best ground upon which a recovery in such case could be allowed.

The case of *Candor's Appeal*, 5 Watts & Serg. 515, which is certainly a very satisfactory case upon this subject, seems to require even more than this. ROGERS, J., says, a recovery could not receive "the countenance of the court unless accompanied *with clear proof of an agreement*, not depending on loose and idle declarations of the defendant, but on unequivocal acts, — as a settlement of an account, or money paid as wages (as in the case of *Andrews and Wife* v. *Foster*). No doubt should be suffered to remain that the services were rendered in the expectation of wages, and not with a view to remuneration from the bounty of the parent, either by will or by gift in his lifetime." This seems to us the true rule upon the subject, except that we should regard the finding of an auditor or the jury as conclusive upon this expectation, if found upon evidence proper to be received as tending to establish the point. But to allow such a recovery upon no express finding of the fact, and upon circumstances which, taken all together, seem to us to indicate the contrary, would

be virtually to abrogate the rule, that such service did not create a debt.

The same view seems still more fully confirmed in a recent case in Pennsylvania, *Lantz* v. *Trey and Wife*, 19 Penn. 366. Lowrie, J., there says: "When individuals stand to each other in a family relation, as distinguished from that of master and servant, the law implies no contract for wages." "This relation must be first changed. Of course an express contract for wages will have this effect."

Judgment reversed and case recommitted.

Franklin County. January Term, 1855.

Backman *v.* Wright.

Agency — Illegal sale — Vermont Liquor Law — Appropriation of payments.

A vendor cannot recover in Vermont on a sale of liquors, illegal by the law of the State, any part of which was transacted within the State. *Aliter* if he does nothing in the State.

If a general agent assumes to sell liquors to persons who have no right by law to buy or hold them for the purpose for which they are bought, it must be considered that his agency extended to that. Notice to him of such want of right in the particular case is notice to the principal; and if the latter ratifies the acts of the agent by completing the sale and claiming the benefit of it, he assumes all its incidents of illegality and notice, and cannot recover.

When a person has a legal and illegal demand, a payment not appropriated by either party before suit will be appropriated by law to the former.

Redfield, C. J. — I. The first question made in this case is in regard to the plaintiff's right to recover for the liquor, the sale of which was negociated through the plaintiff's agent, Drew. Drew was the plaintiff's agent for the purpose of soliciting sales in this state. His agency seems to have been general upon the subject, and not limited to such persons as had license to sell; and he seems perfectly ready to contract or forward orders from persons having no license. Notice to the agent is notice to the principal in that particular transaction. And when the agency seems to be general, and the agent assumes to sell to persons who have no power or right to buy or hold liquors for that

purpose, it must be considered that his agency extended to soliciting sales of that character; while if the principal ratifies the act of the agent, by completing the sale and claiming the benefit of it, he takes it, with all its incidents of illegality and notice of that fact.

The acts of the agent, then, becoming those of the plaintiff, he is implicated in whatever is done within the state, as if he had done it himself. And if one participates in an illegal sale, any portion of which is transacted within the state, he becomes through such participation a partaker in the illegality, and the law will not aid him in the recovery of the stipulated price. But if the vendor does nothing, either by himself or his agent, to forward the illegal contract within the state, he may recover, notwithstanding he may know the illegal purpose to which the article is to be put in another jurisdiction. But if he transact any portion of the contract within the state, he cannot secure himself and evade our law by going into a foreign jurisdiction to consummate the sale. This is virtually decided, and the reasons given more at length than would be proper to repeat here, in *Territt* v. *Bartlett*, 21 Verm. 184. The authorities are there cited in detail, and show most conclusively that such has been the rule of the English law upon this subject for nearly a century.

The rule was applied to a case in Chittenden county, at the last term of this court, where the facts were almost identical with the present.

II. In regard to the charge for two barrels of rum, ordered by the defendant himself through the mail and delivered in New York, the plaintiff is undoubtedly entitled to recover, unless the payments made subsequent to that time, and amounting to more than sufficient to pay this charge, are to be applied in payment of this legal portion of the claim, in preference to the illegal portion.

And neither party having directed or made any specific application of the payments before suit, the law will now make such application as it deems most reasonable and just. And it seems to be perfectly well settled, that in a case like the present the payments are first to be applied to the extinguishment of that portion of the account which constitutes a legal debt on the part of defendant. This identical question was decided by this court in *Wood* v. *Barney*, 2 Verm. 369, in an elaborate opinion by Prentiss, J., where he says: "It was said by Abbott, C. J., in the case of *Wright* v. *Laing*, 3 B. & C. 165, that when a

person has two demands, one recognized by law, the other arising on a matter forbidden by law, and the debtor makes a payment which is not specifically appropriated by either party at the time of the payment, the law will afterwards appropriate it to the demand which it acknowledges, and not to the demand which it prohibits." The same rule is again distinctly recognized in *Bancroft* v. *Dumas*, 21 Verm. 456. It seems impossible to distinguish this case from either of these. The judgment is therefore affirmed.

Washington County. April Term, 1855.

VAIL *v.* PECK AND TRUSTEES.

Assignment for the benefit of creditors — Vermont statute of 1852.

Under the Vermont statute of 1852, in regard to assignments for the benefit of creditors, it is not necessary to give notice to the debtors on choses in action in order to prevent their being held by trustee process during the first ten days after the date of the assignment.

THIS case was argued and held under advisement until the September term, at Danville, when the opinion of the court was delivered by

REDFIELD, C. J. — The only question made in the present case is, whether, in an assignment for the benefit of creditors, under the statute of 1852, it becomes necessary to give notice to the debtors on choses in action, which, by the express terms of the statute, may be included in the assignment, in order to prevent their being held, by trustee process, during the first ten days after the date of the assignment. And it seems to us it is not needful to give such notice. The statute provides a mode of giving publicity and a public character to the assignment, by filing copies of the assignment, and schedules of the property and the creditors, within ten days, "in the county clerk's office where the assignment was made and the property assigned is situated." This property must be regarded as being situated in the creditor's place of residence and business, for all purposes of this statute and giving notice under it. It is not objected that the proper papers were not filed in the office of the clerk of Chittenden county,

where the assignment was made and the property so situated, within the ten days named in the statute; but it was not done until after this attachment intervened.

And we are satisfied it was the purpose of the statute to make the assignment good, for ten days, as to all intervening liens, in favor of creditors certainly, without notice to the debtors. And after that, if the proper papers are not filed in the proper offices, the assignment becomes inoperative as to attachments and levies until said papers are filed; and this, no doubt, even where the assignee may have taken possession or given notice. This view is the only one which seems to us altogether consistent with the provisions of the statute and its general purpose. We find, too, upon examination of the cases referred to in argument, that the same construction has been given, in other states, to statutes very similar to that of 1852. This is so in Connecticut and in Pennsylvania.

Judgment reversed.

Recent English Decisions.

Crown Cases Reserved.

Saturday, June 2.

Before Campbell, C. J., Alderson, B., Erle, J., Platt, B., and Crowder, J.

Regina *v.* Thomas Smith.

Felonious receipt of stolen goods — Evidence — Property in the manual possession of another person under the control of the prisoner.

Upon the trial of an indictment for feloniously receiving a stolen watch, it was proved that the prisoner, who had been present at the time when the watch was stolen, afterwards went to the prosecutor, and offered to get it back for him. The prosecutor agreed to pay a sum of money, and sent a woman with the prisoner to fetch the watch. They went to a room, where was another man, who placed the watch upon the table; and the prisoner directed the woman to take it to the prosecutor, which she did.

The jury were directed, that if they believed that the prisoner knew the watch to have been stolen, and also believed that it was in the custody of another person with the cognizance of the prisoner, that person being

one over whom the prisoner had absolute control, so that the watch would be forthcoming if he ordered it, there was ample evidence to justify them in convicting the prisoner.

The jury found a verdict of guilty, stating their belief that, though the watch was in the hands of another, it was in the prisoner's absolute control:

Held, that the direction was right, and the conviction warranted by the evidence, although the same evidence would also have warranted a conviction for larceny.

THE following case was reserved by the recorder of Brighton.

At the quarter sessions of the peace for the borough of Brighton, holden, &c., on the 8th May, 1855, the prisoner, Thomas Smith, was indicted for feloniously receiving a stolen watch, the property of John Nelson, knowing the same to have been stolen. It was proved that John Nelson, the prosecutor, between eleven and twelve o'clock at night of the 12th April in this year, was in a public house called the Globe, in Edward street, in the said borough. He was in company with a prostitute, named Charlotte Duncan, who lodged in a room of a house, No. 17, Thomas street, Brighton, which belonged to the prisoner, of whom she rented the room.

The prisoner and five or six other persons were present in the apartment in the Globe inn when the prosecutor and Charlotte Duncan entered. While the prosecutor was drinking in the Globe, his watch, being the watch named in the indictment, was taken from his person by some one who forced open the ring which secured the watch to a guard. The prosecutor heard the click of the ring and immediately missed his watch, and taxed the prisoner as the thief. A policeman was sent for and a partial search was made, but the watch was not found. The prisoner was present all that time. Soon after the loss of the watch, the prosecutor and the girl Charlotte Duncan went together to Charlotte Duncan's room in Thomas street. After they had been there together little more than an hour, the prisoner came into the room where they were, and said to the prosecutor, "Was not you in the Globe, and did not you lose your watch?" The prosecutor said, "Yes." The prisoner then said, "What would you give to have your watch back again?" Prosecutor said, "I'd give a sovereign." Prisoner then said, "Well, then, let the young woman come along with me, and I will get you the watch back again." Charlotte Duncan and the prisoner then went together to a house

close by, in which the prisoner himself lived. They went together into a room in which Hollands was. This was nearly one o'clock; there was a table in the room. On first going in, Charlotte Duncan saw there was no watch on the table; but a few minutes afterwards she saw the watch there. The prisoner was close to the table. She did not see it placed there, but she stated it must have been placed there by Hollands, as if the prisoner, to whom she was talking, had placed it there she must have observed it. The prisoner told Charlotte Duncan to take the watch and go and get the sovereign. She took it to the room in 17, Thomas street, to the prosecutor, and in a few minutes the prisoner and Hollands came to that room. Hollands asked for the reward. The prosecutor gave Hollands 2*s.* 6*d.*, and said he believed the watch was stolen, and told him to be off. Hollands and the prisoner then left. The prisoner did not then say anything, nor did the witnesses see him receive any money. Hollands absconded before the trial.

The recorder told the jury that if they believed that when the prisoner went into the room, 17, Thomas street, and spoke to the prosecutor about the return of the watch, and took the girl Duncan with him to the house where the watch was given up, the prisoner knew that the watch was stolen; and if the jury believed that the watch was then in the custody of a person with the cognizance of the prisoner, that person being one over whom the prisoner had absolute control, so that the watch would be forthcoming if the prisoner ordered it; there was ample evidence to justify them in convicting the prisoner for feloniously receiving the watch.

The jury found the prisoner guilty; and, in answer to a question from the recorder, stated that they believed that, though the watch was in Holland's hand or pocket, it was in the prisoner's absolute control. Sentence was passed on the prisoner, but was respited until the opinion of the court could be taken.

The question for the opinion of the court is, whether the conviction of the prisoner is proper.

Creasy, for the prisoner. The direction of the recorder was wrong, and the conviction wrong. There was no sufficient proof of a possession by the prisoner; or, if Hollands' possession is to be treated as the prisoner's, then there is no proof that the watch was stolen by some other person. The direction would mislead the jury; because,

if the transaction at the Globe inn is relied upon as showing concert between the prisoner and Hollands, then the evidence shows a stealing by them, and not a receiving. The prosecution, in order to make out the charge of receiving, were bound to lay before the jury evidence that the stealing was by some other person. (2 Russell on Crimes, ed. Greaves, 247, citing *R.* v. *Densley*, 6 Car. & P. 399, per PATTESON, J.)

PLATT, B. — Was not the prisoner also indicted for stealing the watch?

Creasy. — Yes; but he was acquitted of that charge the day before he was tried for receiving. That circumstance, however, ought not to prejudice his case; and it is submitted that no act of receiving is proved against him. If Hollands was the thief, the stolen property continued in his possession throughout; and, according to the decision of the majority of the judges in *R.* v. *Wiley*, 20 L. J. 4, M. C.; 2 Den. C. C. 37, neither the circumstance that the property was in the prisoner's house, nor the expressions which he used, would afford any sufficient evidence of a possession by him. (He referred to the judgments of ALDERSON and PLATT, BB., and PATTESON, J., in *R.* v. *Wiley*.) The possession of the girl was as agent for the prosecutor, not for the prisoner.

Lord CAMPBELL, C. J. — Do you say that there cannot be any case of joint possession by thief and receiver? I think all the judges, in *R.* v. *Wiley*, agreed that there might.

ALDERSON, B. — In that case the jury were not properly directed; but here the very distinction taken in that case has been explained to the jury.

Creasy. — But there is no evidence here of any such possession by the prisoner as the judges held to be necessary.

PLATT, B. — The prisoner claims dominion over the watch.

ERLE, J. — "Possession" is one of the most vague of all vague terms, and shifts its meaning according to the subject-matter to which it is applied; varying very much in its sense, as it is introduced either into civil or into criminal proceedings. But what principle, do you say, is to be extracted from *R.* v. *Wiley?*

Creasy. — This, at least, — that mere companionship with the thief and a corrupt bargaining for the stolen property are not enough to render a man liable to convic-

tion as a receiver. PARKE, B., in his judgment, points out the distinction between a receiving of the stolen goods within the statute, and a receiving of the thief, he keeping possession of the goods. PATTESON, J., also lays it down that to constitute the offence of receiving, the goods must be under the prisoner's control. Between the theft and the completion of that transaction, which is presented as evidence of a felonious receiving, something must occur to transfer the possession; and in this case the lapse of time between the stealing and the supposed evidence of receiving is very short. Everything, therefore, points to a joint participation between Hollands and the prisoner from the beginning; and, indeed, the prisoner was charged with the theft at the time.

ERLE, J. — What evidence is there that Hollands was the thief?

Creasy. — Possession of the watch recently after it was stolen; and if the prisoner had possession of it at all, his possession also was, under the circumstances, evidence of stealing, and not of receiving.

No counsel appeared for the prosecution.

Lord CAMPBELL, C. J. — I am of opinion that this conviction is right; and the direction of the learned recorder unexceptionable. According to all the cases, and the *dicta* of the judge's manual, possession of the stolen property is unnecessary in order to constitute the offence of receiving, and to lay down the contrary would, indeed, be proclaiming impunity for the receivers of stolen goods. Further, according to the decisions, including *Wiley's* case, there may be a joint possession by the thief and the receiver, and it is a question for the jury whether there has been such a possession. In *Wiley's* case, a majority of the judges thought that that question had not been properly left to the jury; and that was the *ratio decidendi.* Here the case was properly left to the jury; and I should say, adopting the expression of the recorder, that there was "ample evidence" to justify the jury in coming to the conclusion at which they did arrive. They might, certainly, upon this evidence, have come to a different conclusion, and they might have believed that Smith was the thief. If the prisoner had been indicted for larceny, and the jury had found him guilty, I should have thought that they had come to a right conclusion upon the facts; and if the jury in this case had drawn that conclusion, the prisoner would certainly have been entitled to an acquittal.

There was also another inference which the jury might have drawn, — namely, that Hollands, being the thief, the property remained in his exclusive possession, and that Smith acted merely as the agent between him and the prosecutor to negotiate for the return of the stolen property. In that case there would have been no possession at all by Smith; and he would have been entitled to an acquittal. But the jury have formed a different opinion upon the evidence, — one which they were quite justified in forming, — namely, that even if Hollands was the thief, he had placed the watch under the control of Smith for the purpose of disposing of it. We know from real life, as well as from dramas and novels, that such arrangements are actually made as that between Peachum and Lockit in the Beggar's Opera; and if, in pursuance of an arrangement between Smith and Hollands, the property was deposited in a place where it would be under the control of Smith, there would be a possession by Smith as well as Hollands, if the possession of Hollands continued. What took place at the time when the watch was delivered up afforded evidence of some such arrangement, and I therefore am clearly of opinion that there was evidence for the jury of a possession by Smith of the stolen chattel, he knowing it to have been stolen.

Alderson, B. — I also think that there was abundant evidence from which the jury might not unreasonably draw the inference that the prisoner was the receiver. They might have drawn the conclusion that he was the thief; but they might also believe his own statement, and think that he had not stolen but received the watch. If the watch was delivered to the prisoner, he knowing it to be stolen, for the purpose of obtaining money by returning it to the owner, what difference does it make whether Hollands was a party to that arrangement? The prisoner was exercising control over and dealing with the stolen property.

Erle, J. — I doubt whether the word "receive" in the statute is used as equivalent to "receive into possession." I do not think that "possession" is a word properly applicable to the subject; and Patteson, J., in *R.* v. *Wiley*, appears to me to employ a better expression when he says, that in order to constitute a receiving, manual touch is not necessary; but it is enough if the receiver has control over the property stolen. In that view of the subject, the

direction of the recorder was right, and the evidence warrants the finding.

Platt, B. — Although there was some evidence of Smith being the thief, there certainly were circumstances in the case which might well lead the jury to suppose that some other person had committed the robbery; for the stolen property is immediately missed, the prisoner charged with the theft, and a partial search made, yet no watch found.

Crowder, J. — I also think the direction right, and the jury justified in finding the prisoner guilty. They certainly might conclude that Hollands was the thief, and then the question would arise whether the watch was ever under the control of Smith. Upon this evidence I think it was, and that the conviction is right.

Conviction affirmed.

Vice-Chancellor Wood's Court.

Thursday, July 26.

Lady Andover *v.* Robertson.

Lessor and lessee — Covenant — Injunction — Agreement.

A. B., lessee of a house, agreed with the landlord of another house which adjoined, that if the lease of the latter were renewed certain windows should be closed up. The lease was not renewed, but a new lease was granted to another lessee, previously to which A. B. and the landlord agreed that the windows, instead of being closed, should be treated in a particular manner, and in the lease such lessee covenanted so to treat them:

Held, upon a bill filed by A. B. against the subsequent lessee, that the latter must be restrained from violating this covenant. The interference with the privacy of a lessee in the enjoyment of his tenement is not of a trivial nature, and the court will interpose its authority to protect the enjoyment.

This was a motion for an injunction. The plaintiff in the suit was Viscountess Andover, lessee, under the Duke of Portland, of the house No. 88, Harley street, Cavendish square. The defendant, Mrs. Jane Angus Robertson, was lessee, under the same landlord, of No. 1a, in Wigmore street. From the bill and affidavits it appeared that the facts were, that No. 88, Harley street, is on the west side, and adjoins the corner house, which up to 1854 was held

by Dr. Monro, who had underlet the western part of his house, fronting Wigmore street, and adjoining at the back the plaintiff's out-offices. This part so underlet was converted into a small dwelling house, No. 1A, Wigmore street, at the back of which two windows were opened on the ground and first floors. In consequence of the annoyance caused by these windows to Lady Andover, an arrangement was negotiated with the solicitors of the Duke of Portland, on the renewal of her lease, that in the event of Dr. Monro or his nominee not renewing his lease, it should be a stipulation with any other lessee thereof that no windows should overlook the premises, the plaintiff alleging by her bill that her special object in making the stipulation was that both the windows should be permanently closed up; and on the faith of this she renewed her lease. Dr. Monro did not renew his lease, and the small tenement in question ultimately came into the possession of the defendant, Mrs. Robertson, under a lease granted direct from the Duke of Portland. Previously to the granting of this lease, however, a memorandum (with a plan annexed) was signed by the solicitors of the Duke of Portland and the plaintiff respectively, by which Lady Andover waived her objections to the continuance of the windows (marked D and E on the plan) on certain conditions; and, among others, "the iron guard-bars in front of the windows D and E to be fixed permanently, and no alteration or other windows to be made during Lady Andover's lease without her consent. The necessary restrictions to be introduced in the new lease of No. 1A, Wigmore street, to carry out the foregoing arrangements." Accordingly, the lease granted to the defendant contained a covenant by her that she would, at her own expense, fix permanently iron guard-bars to the windows on the ground and first floors at the north end of the premises. At the time of this agreement, the grating at the window D opened with a swivel, that at the lower one being fixed and of an ornamental character. This lower grating had been removed altogether, and instead of it the defendant had put up two perpendicular bars, which the plaintiff alleged were wholly ineffectual for the purposes contemplated by her in signing the memorandum; and the upper grating still moved on a swivel, of which the defendant had taken advantage to hang out what was described in the bill as a "meat safe," overhanging the out-offices of

the plaintiff, but which the defendant called a "box in which she had put flower-pots."

Daniel and *Greene* for the motion.

Rolt and *Freeling* opposed it, upon the ground of the matter being beneath the notice of the court.

The VICE-CHANCELLOR said he could not agree in thinking that this complaint was of a trivial nature. Every one was most sensitive as to having his privacy interfered with, and it was a species of injury which people were most anxious to guard against. It was clear that the plaintiff had been very desirous of having the overlooking windows blocked up altogether, and it was only on finding that the Duke of Portland had some objection to this that she had consented to give way, and to be content with the conditions stipulated for in the agreement, as explained by the plan; and the only construction which could be put upon that agreement was, that the bars which then existed in front of the windows were to be permanently fixed; and as one of them at that time went on a swivel, the agreement had a special application to that particular window. The fact of the meat-safe having been placed outside this window, and other matters deposed to by the affidavit, showed the advantage of having this properly closed, pursuant to the agreement; and although the injury complained of as to the lower window was not serious enough to induce the court to interfere by mandatory injunction, the one which was now on a swivel must be at once closed. His honor accordingly granted an injunction restraining the defendant from throwing back, or removing, or keeping thrown back the bars which are represented on the plan as being in front of window D, and no order as to the rest of the injunction asked for.

Miscellany.

TRIAL OF MESSRS. STRAHAN, PAUL AND BATES. — The trial of these persons for illegally disposing of securities to a large amount, which had been entrusted to them, as bankers, for safe custody, has lately taken place at the central criminal court in London. The previous high position and reputation of the parties, and the nature of their crime, gave great interest to the proceedings, an interest which the frequent occurrence among us of transactions not altogether dissimilar may extend to this

country. And although we are unable to give our readers a full account of the case, the report of which fills about eight finely printed columns of the Evening Mail, we venture to give some extracts from this report.

The defendants were indicted under the 7th & 8th of Geo. 4, chap. 29, § 49, which provides: —

"And for the punishment of embezzlements committed by agents intrusted with property, be it enacted, that if any money, or security for the payment of money, shall be intrusted to any banker, merchant, broker, attorney or other agent, with any direction in writing to apply such money or any part thereof, or the proceeds or any part of the proceeds of such security, for any purpose specified in such direction, and he shall, in violation of good faith, and contrary to the purpose so specified, in any wise convert to his own use or benefit such money, security or proceeds, or any part thereof respectively, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to suffer such other punishment, by fine or imprisonment, or by both, as the court shall award; and if any chattel, or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom, or of Great Britian, or of Ireland, or of any foreign state, or in any fund of any body corporate, company or society, shall be intrusted to any banker, merchant, broker, attorney, or other agent for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer or pledge, and he shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security or power of attorney shall have been intrusted to him, sell, negotiate, transfer, or pledge, or in any manner convert to his own use or benefit such chattel, or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned."

The attorney general, in opening the case for the prosecution, remarked: —

I have, on the present occasion, a painful duty to discharge in pressing an accusation of a very serious character against the defendants on this indictment, — gentlemen known to most of us, and who have hitherto maintained a high position in society, and a character of unquestioned integrity and honor, which prevented them from being supposed capable of the offence with which they are now charged. The present charge is one not only involving penal consequences of great magnitude, but also affecting the honor and character of those gentlemen at the bar. You are aware that the defendants carried on for some time the business of bankers in this metropolis. The firm was one of ancient date; its transactions were large, and it enjoyed the confidence of a highly numerous body of customers. Among others, the present prosecutor, Dr. Griffith, prebendary of Rochester, opened an account with the then firm of Snow, Paul & Co. in 1830. In 1838 Snow retired, and the present defendants, Strahan and Bates, joined the firm. Subsequently Sir J. D. Paul, the father of the defendant (Sir J. D. Paul), died, and from that period the business has been conducted by the three defendants. Dr. Griffith continued the account he had opened with the firm of Snow, Paul & Co. in 1830, until the transactions now the subject of inquiry occurred. He was a gentleman of great fortune and character, and employed the defendants, as bankers, to invest money for him from time to time in public and foreign securities. The present inquiry relates to some of those securities, fraudulently disposed of by the defendants, in contravention of the statute which makes it penal to dispose of securities placed in their hands for safe custody. Among these securities were certain bonds issued by the Danish government, bearing interest at the rate of five per cent.; and I will confine my present observations entirely to those securities, as they form the subject of the present inquiry.

It was alleged that five thousand pounds of these bonds were illegally disposed of by the defendants in March, 1854. After that the defendants bought other bonds to replace them, which they again disposed of for their own benefit. On proceedings in bankruptcy they made a joint statement relating to the affairs of the bank, which commenced by stating that the defendants solemnly deposed that the statement then handed in was a

true and correct statement of all bonds and securities belonging to their customers that had been sold, pledged, or in any other manner appropriated to their use. The statement referred to in this deposition contained a long list of different securities, and among them were menttoned 5000*l.* five per cent. Danish Bonds, which were stated to be the property of Dr. Griffith, and to have been pledged with Messrs. Overend, Gurney & Co. on the 13th of April, 1855.

Separate statements were made to the same effect by each of the defendants, and upon this they relied under another section of the statute already quoted, which enacted : —

"That nothing in this act contained, nor any proceeding, conviction or judgment to be had or taken thereupon against any banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall prevent, lessen or impeach any remedy at law or in equity which any party aggrieved by any such offence might or would have had if this act had not been passed; but, nevertheless, the conviction of any such offender shall not be received in evidence in any action at law or suit in equity against him; and no banker, broker, merchant, factor, attorney or other agent as aforesaid, shall be liable to be convicted by any evidence whatever as an offender against this act in respect of any act done by him, if he shall at any time previously to his being indicted for such offence have disclosed such act, on oath, in consequence of any compulsory process of any court of law or equity in any action, suit or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankruptcy."

Without giving a detail of the evidence, or pointing out the position of the respective defendants, we pass to the summing up of Baron Alderson, who, with Baron Martin and Mr. Justice Willes, held the court.

He said, that before the conclusion of the present proceedings he should ask the jury an incidental question, arising out of part of the evidence and argument of counsel ; but the question he should leave for them to decide — namely, whether the defendants were guilty or not — was of a totally different description. He thought the jury had better confine their attention to the charges in the first four counts of the indictment, though there were other counts, respecting conspiracy, &c. The first four counts set forth that the defendants were the bankers and agents of Dr. Griffith, by whom they were intrusted with certain valuable securities therein mentioned for safe custody, and that, notwithstanding, they, without any authority, sold and converted the same to their own use, contrary to their duty and trust. Respecting a good deal of that statement there was no doubt; but the question for the jury to decide was, whether the defendants sold those securities contrary to their trust If they did, they were guilty of the misdemeanor which was charged against them in the indictment, and the punishment for which was provided by the 7th and 8th Geo. IV., cap. 29. That was the question now to be determined. No doubt, there was a great difference in the cases of the three defendants. Against Sir J. Paul the case pressed more hardly than against the other two, and against Mr. Strahan more hardly, perhaps, than against Mr. Bates. That was the order, probably, in which the jury would have to consider their respective guilt or innocence. The learned judge here recapitulated the evidence of Dr. Griffith with reference to the 5000*l.* Danish bonds on which the question before the court arose, and said the jury would have to consider whether or not they could reasonably infer that the transactions which took place in reference to those bonds were such as from their nature partners in the same bank must be cognizant of. It had been proved that those bonds had been purchased for Dr. Griffith and left with the defendants for safe custody, and they were particularly marked by their amounts, dates and numbers. It did not appear whether Dr. Griffith had ever seen them, but that was not material, for it was not necessary that he should

see them in order to be their owner in point of law. Dr. Griffith stated that he had transacted his business almost solely with Mr. Bates, and that he never received the slightest intimation of any change having taken place in the custody of these bonds, the interest for which he had carried to his account every half-year, and that he never gave the defendants any authority to sell or convert them to their own use. After the application at Bow-street Mr. Strahan called on Dr Griffith, and, admitting that some securities had been disposed of, added that it was the first dishonest act of his life. That observation, however, referred to the 5000*l.* Danish bonds subsequently purchased and substituted for the original bonds, and not to the bonds mentioned in the present indictment. Mr. Strahan's counsel had told the jury that they must take this statement into consideration, and conclude from it that Mr. Strahan was not cognizant of any previous improper proceeding done by another in reference to the securities. However, he (Mr. Baron Alderson) must tell the jury that they were not bound to believe either the whole or any part of the statement made by Mr. Strahan on that occasion. They must take it into their fair consideration as one of the circumstances in the case, and no more. Mr. Strahan was certainly incorrect in saying that that was the first fraudulent transaction on his part, if he were a party to the transaction of 1854, unless he salved his conscience over by the notion that reparation was made for that which before was a wrong act, and that the wrong had been removed by the subsequent substitution of fresh bonds. It was just possible for persons to take that view of their conduct, but the law did not. The jury were entirely to judge on that matter; and here he would observe that the statements put in for the purpose of making a "disclosure" showed that Dr. Griffith had been a loser to a considerably larger amount than the 5000*l.* Danish bonds in question. The check for 12,228*l.*, which was paid in bank notes, was dated March 16, 1854, which agreed with the items in Sir J. D. Paul's private account. A clerk of Foster and Braithwaite received the bonds from Mr. Beattie, and there could be no doubt, from the numbers and amounts of the bonds sold, that among them were those bought by the firm in 1851 for Dr. Griffiths, deposited by him in their hands for safe custody, and safely kept by them up to that time. These bonds were thus sold by Sir J. D. Paul, and this transaction was the subject of the present charge. There could be no doubt as against Sir J. D. Paul — waiving for a moment the question whether the disclosure before the court of bankruptcy were an answer to the present charge — that a clear offence against the statute had been committed in disposing of these Danish bonds intrusted to him for safe custody. This was a clear breach of trust on his part, which breach of trust in a banker was punishable as a misdemeanor by the 7th and 8th George IV., chap. 29. He should not have considered it necessary to carry the case any further, but evidence had been called to show that the bonds were sold to Messrs. Rothschild, Cohen, and other parties, that these parties received the dividends upon them, and that the defendants had ceased to have any property whatever in the bonds thus sold by Foster and Braithwaite, although the dividends were regularly carried to Dr. Griffith's credit. Then the gentleman had been called who negotiated this loan, and who proved that every bond had a distinct number, the conclusion being that these Danish bonds were individual things, which were not to be replaced by other bonds of equal value. There being, then, a clear case against Sir J. D. Paul, unless he had absolved himself by the disclosure, the next question was whether the other two partners were parties to the transaction. A partner was civilly responsible for the acts of his copartners. And why? Because by an agreement between him and his copartner he

was constituted an agent for all acts done in pursuance of the partnership for his copartner. He was therefore civilly responsible for all acts done, either in the presence or absence of his copartner; but he was not responsible, and could not be held responsible for any act done by his copartner criminally; because no man could constitute another his agent to do a criminal act without his personally desiring him to do it, or acting with him in carrying it into effect. He was only criminally responsible for the acts of his partner if he personally took part in the transactions, and therefore the jury would have to look, not merely to the question of whether Strahan and Bates were partners in the concern, but also to whether they could be considered as being parties to the criminal act of Sir John Dean Paul in selling the bonds in question. If they were not proved to their satisfaction to have been in a state of what was called "complicity" with Sir John Dean Paul in the act with which he was charged, God forbid that they should be held punishable for his criminal conduct. When the jury came to take the case into consideration they could not, however, altogether leave out the circumstance of their being partners, because, as partners, they might have a knowledge of the nature of the business which was going on, and it was for the jury to say whether, being partners, and having the means of knowing, the circumstances were such as induced them to believe that the defendants did know and were privy to the fraudulent transactions which formed the subject of the present charge. What were the circumstances which were calculated to lead to the inference of the guilty complicity of all the partners? In the first place, there was the money which was brought to the bank from the sale of the bonds by Messrs. Foster and Braithwaite, and the aggregate amount of which was placed to the credit of the private account of Sir John Dean Paul. He would not contend that it would necessarily follow, but, generally speaking, he thought a partner would inquire how, and under what circumstances, a sum of 12,000*l.* or more came to be placed to the private account of one of his copartners. Then, again, they were told that the securities of Dr. Griffith were kept in the strong room, and there appeared no reason to doubt that they were there up to a certain period, after which they could not have been found, nor were there any others substituted for them until June. Did people never walk into their strong rooms, or know what was in them, or did they not look after the securities deposited with them, or were they not presumed to look after the removal of any portion of these securities? The defendants had the means of knowing; the question was, did they make use of those means, and did they know the circumstances? Then there was the circumstance that afterwards the whole of the defendants made a statement or "disclosure," as it was called, in which they spoke of the 5000*l.* Danish five per cents. deposited with Messrs. Overend, Gurney & Co., on the 30th of April, 1855, and followed by 10,000*l.* three per cent. belonging to Dr. Griffith, sold by Messrs. Foster and Braithwaite on the 14th of March, 1854. But nothing was said of the 5000*l.* being sold in the first instance. They stated the fact of a partial sale, but they did not state the whole of it. Did they know the whole transaction, or part only? If they knew the whole, why was it that nothing was said about the first sale? Or did they think that the substitution of one set of bonds for the other took away the fraudulent character of the first transaction? One part of the case was perhaps not so strong against the defendant Bates. He did not state in his examination that he knew of his own knowledge of the sales or deposit of securities, or had anything to do with them. While the other defendants in their separate examinations spoke of securities "pledged or converted by me," Bates only spoke of securities "pledged or converted by any

or either of my partners." With regard to Strahan, there was the circumstance to be taken into consideration of his statement to Dr. Griffith, which had been urged as negativing, to some extent, the fact of his knowledge of the first transaction. This was a circumstance in the case proper for the consideration of the jury. The evidence showed that the act of selling the securities was the act of Sir J. D. Paul, but if the jury were satisfied the act was done with the knowledge and consent of the other defendants, and for the purposes of the firm, they were equally guilty of the charge. The jury would consider, also, the numerous opportunities which Strahan and his partners had of knowing all these circumstances, and yet that no complaint or outcry had been raised to Dr. Griffith on the subject. With respect to the defendant Bates the case was, in some respects, stronger than that of Strahan, inasmuch as he was the most active partner in connection with the firm, and was the person who most frequently held communication with Dr. Griffith. The defendant Strahan might have thought that the restoration of the Danish bonds by others of a similar amount might have satisfied Dr. Griffith; and so perhaps it would, if the substitute bonds had been forthcoming. That, however, would have been no answer in point of law to the crime of converting them, although it might perhaps have prevented Dr. Griffith from putting the law in force. The last point to which he would refer was one which was rather a question for the Court than for the jury — one with respect to the construction of the act. It was certainly a very singularly worded act, and the framers of it probably never dreamt that anything would occur under it like what had arisen in the present case. The words of the section in the act were —

"And no banker, merchant, broker, factor, attorney or other agent, as aforesaid, will be liable to be convicted by any evidence whatever as an offender against this act in respect of any act done by him, if he shall, at any time previous to his being indicted for such offence, have disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit or proceeding which shall have been *bona fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankruptcy."

Under the bankruptcy act, the commissioners had authority to examine bankrupts after they had made and signed a declaration; or there might be a deposition in order to establish some matter in dispute which the court wished to have cleared up. But, was the "disclosure" made by the defendants in the court of bankruptcy made under circumstances of that kind? In the first place, the "disclosure" was not a disclosure at all of the particular act charged against them. There was no disclosure in any one of the documents put in that the parties had, in 1854, appropriated to their own use, and transferred to Messrs. Foster and Braithwaite the 5000*l.* Danish bonds which Dr. Griffith now complained of being deprived of. The Danish bonds assigned to Messrs. Overend, Gurney & Co., and mentioned in the "disclosure," were different from those mentioned in the indictment, and agreed only with them in the amount of value. But, could any one suppose that a person, by voluntarily disclosing of his own accord a misdemeanor committed by him, could escape the penalty attached to that misdemeanor? Was it to be imagined that the parliament would play fast and loose with the criminal law in such a way, first inflicting the penalty of fourteen years' transportation on certain offenders, and then allowing those offenders to acquit themselves from all punishment? Was that proceeding of the defendants before the court of bankruptcy a *bonâ fide* examination, or any deposition to settle some disputed point which the court required to be satisfied on? There was a rule of law well known in reference to transactions of this description; and he would ask the jury whether it was their opinion that this was a real and *bonâ fide*

proceeding in bankruptcy, or whether it was not a got up proceeding and sham, — a farce prepared to be played in open court? He should ask them that question, not that their opinion would ultimately determine the point, but lest, in the event of its being hereafter discussed, some one should say that he ought to have left it to the jury. It was on that account he wished for their opinion on the point, though he and his learned brothers near him entirely agreed in not entertaining any serious doubt at all on the question. It was now for the jury to take the case into their consideration, and if they believed that the defendants, Mr. Strahan and Mr. Bates, were in complicity with Sir J. Paul in doing the act charged, and that it could not have been done without their knowledge and concurrence, they must find all the accused guilty; but if they deemed the evidence too doubtful to enable them to draw that conclusion, they would, of course, give the accused the benefit of the doubt. If they thought that there was any difference in the cases of the defendants, they would, of course, mark by their verdict the distinction. He desired nothing more than that they should come to a just, sound and candid conclusion.

The jury deliberated together for a few minutes in their box, and then retired to consider their verdict. After an absence of about twenty minutes they returned, and pronounced a verdict of *GUILTY* against all the defendants.

Mr. Baron ALDERSON inquired their opinion of the "disclosure" before the court of bankruptcy.

The foreman replied that the opinion of the jury was that it was no disclosure within the meaning of the act.

Mr. Baron ALDERSON. — You look on it, then, as a sham affair?

The foreman stated that the jury did not consider it a *bona fide* disclosure.

Mr. Baron ALDERSON intimated his entire concurrence with the jury in this opinion.

A verdict of *Guilty* was then taken on the first and third counts, and of *Not Guilty* on the others.

Mr. Baron ALDERSON, after a short pause, proceeded to pronounce the judgment of the court upon the prisoners in the following terms: — William Strahan, Sir John Dean Paul and Robert Makin Bates, the jury have now found you guilty of the offence charged upon you in this indictment, the offence of disposing of securities which were intrusted by your customers to you as bankers, for the purpose of being kept safe for their use, and which you appropriated, under circumstances of temptation, to your own. A greater and more serious offence can hardly be imagined in a great commercial city like this. It tends to shake confidence in all persons in the position you occupied, and it has shaken the public confidence in establishments like that you for a long period honorably conducted. I do very, very much regret that it falls to my lot to pass any sentence on persons in your situation, but yet the public interests and public justice require it; and it is not for me to shrink from the discharge of any duty, however painful, which properly belongs to my office. I should have been very glad if it had pleased God that some one else now had to discharge that duty. I have seen (continued the learned judge, with deep emotion) at least one of you under very different circumstances, sitting at my side in high office, instead of being where you now are, and I could scarcely then have fancied to myself that it would ever come to me to pass sentence on you. But so it is, and this is a proof, therefore, that we all ought to pray not to be led into temptation. You have been well educated, and held a high position in life, and the punishment which must fall on you will consequently be the more seriously and severely felt by you, and will also greatly affect those connected with you, who will most sensitively feel the

disgrace of your position. All that I have to say is, that I cannot conceive any worse case of the sort arising under the act of parliament applicable to your offence. Therefore, as I cannot conceive any worse case under the act, I can do nothing else but impose the sentence therein provided for the worst case, — namely, the most severe punishment, which is, that you be severally transported for fourteen years.

The prisoners, who seemed astounded by their sentence, leant against the dock as if they expected their counsel to make some observations to the court, but after a short interval, they slowly retired in custody. The reverend prosecutor, Dr. Griffith, was observed to shed tears when the sentence was pronounced, but the judgment appeared to give satisfaction to a crowded court.

It is stated that they will remain in Newgate or the Millbank prison until a complete investigation of their affairs is made and a balance sheet in bankruptcy filed, and that afterwards they will be removed to Gibraltar for the remaining period of their sentence.

Rules of Practice of the Court of Claims.[1] — I. Every claim shall be stated in a printed petition addressed to the court, and signed by the claimant or his counsel.

II. The petition must set forth a full statement of the claim, and of the action thereon in congress, or by any of the departments, if such action has been had, specifying also what person or persons are owners thereof or interested therein, and when and upon what consideration such person or persons became so interested. If the claim is founded upon any law of congress, or upon any regulation of an executive department, the act of congress and the section thereof upon which the claimant relies must be stated, and the particular regulation of the department must be specified. If the claim is founded upon any express contract with the government of the United States, such contract must be set forth in the petition, and, if it be in writing, in the words of the contract. If it be founded upon any implied contract, the circumstances upon which the claimant relies as tending to prove a contract must be specified. There must be annexed to the petition an affidavit of the claimant, or his agent, or, where there are several claimants, of one of them, or of some other credible person, that the facts stated in the petition are true, to the best of his knowledge and belief.

III. When the petitioner cannot state his case with the requisite particularity without an examination of papers in one of the executive departments, and has been unable to obtain a sufficient examination of such papers on application, he may file a manuscript petition stating his claim as far as is in his power, and specifying as definitely as he can the papers he requires in order to enable him to state his claim. The court will thereupon make a special order calling upon the proper department for such information or papers as it may deem necessary, to be delivered to the clerk of the court, to be filed in his office. The manuscript petition may then be amended, and the amended petition printed and filed, and may occupy upon the docket the place of the original petition.

IV. Each claim shall be entered on the docket on filing the petition, or, in cases referred by either house of congress, on filing a petition and the papers in the case referred.

V. The claimant, when he files his petition, shall deliver to the clerk ten copies thereof for the use of the judges and the solicitor.

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[1] We find some differences between these rules, as formerly printed by us, and the present authorized edition, and we therefore reprint them from that edition. —Eds.

VI. If the solicitor shall be of opinion that the petition does not state a proper case for the action of the court, it shall be his duty, after the filing of the petition, to furnish the clerk ten printed copies of his objections, for the judges and the claimant.

VII. There shall be no other pleadings than those above stated.

VIII. If the petition be adjudged to be sufficient, the court will authorize the taking of testimony in the case.

IX. The court will appoint permanent commissioners for the taking of testimony, and special commissioners as circumstances may require.

Every permanent commissioner shall take an oath, before he enters upon his duties, that he will faithfully discharge them so long as his commission remains in force; and every special commissioner shall take an oath faithfully to discharge his duties.

The form of a commission to a permanent commissioner shall be as follows:

COURT OF CLAIMS.

To —— ——, *of* ———, *in the county of* ——,
and state of ———, ——, *esquire:*

You are hereby appointed a commissioner, during the pleasure of this court, for the state of ——, to take the testimony of such witnesses as may come before you, to be used in the investigation of such claims as may be presented to this court against the United States. In the performance of this duty you will be guided by the rules of this court, and in making your certificate of the taking of depositions you will follow the form prescribed by the 15th rule. You will take no deposition, unless by consent of the parties, until it is shown to you, by the return upon the original notice, that the adverse party has been duly notified; and if he do not appear, you will affix the original notice to your certificate, and return it therewith for the information of the court.

—— ——, *Clerk.*

When special commissions are issued, such variations from the above form as may be necessary will be made. The several judges and clerks of the courts of record for the time being in the states and territories of the United States, in the counties in which no permanent commissioner may reside, are hereby appointed commissioners to take testimony to be used in the investigation of claims before this court, in the counties in which they may respectively reside, during the pleasure of this court; and this rule shall be a sufficient commission to each of said judges and clerks in the premises.

X. The form of a subpœna shall be as follows:

COURT OF CLAIMS,

To —— ——.

You are hereby commanded to appear before ———, commissioner appointed by this court to take depositions, on the ——— day of ———, A. D. 185—, at —— o'clock, in the ——— noon, then and there to testify in the case of ——— against the United States, now pending in this court. Fail not of appearance, at your peril.

Dated this —— day of ———, A. D. 185—.

———, *Clerk.*

XI. The party proposing to take depositions shall cause fifteen days' notice to be given thereof to the solicitor, or to the claimant or his counsel, as the case may be. The notice must be in writing, and must state the names of the commissioner, and of the witnesses, and of the claimant, and the day of the month, the hour and the place of taking the deposition, and must be subscribed by the solicitor or his agent, or by the claimant or his attorney of record. When the claimant proposes to take a deposition, and

the witness resides more than five hundred miles from Washington, or where the solicitor proposes to take the deposition, and the witness resides more than five hundred miles from the claimant or his counsel, one day's further notice shall be given for every additional twenty miles.

XII. If the witness, having been duly summoned and his fees tendered him, shall fail or refuse to appear and testify before any commissioner, a rule upon him shall be issued, on motion, to show cause why a fine should not be imposed upon him; and if he fail to show sufficient cause, he shall be fined not exceeding one hundred dollars.

XIII. All witnesses shall be sworn or affirmed before any questions are put to them, to tell the truth, the whole truth, and nothing but the truth, relative to the cause in which they are to testify; and each witness shall then state his name, his occupation, his age, his place of residence for the past year; whether he has any interest, direct or indirect, in the claim which is the subject of inquiry; and whether, and in what degree, he is related to the claimant. At the conclusion of the deposition, the witness shall state whether he knows of any other matter relative to the claim in question; and if he do, he shall state it.

XIV. All evidence must be in writing, and all depositions must be taken by questions, each of which is to be written down by the commissioner in the body of the deposition, and then proposed by the commissioner to the witness, and the answers thereto are to be written down by the commissioner in the presence of the witness. But interrogatories and cross interrogatories may be administered under the supervision of the court whenever, in their opinion, justice and expediency require; and each deposition must be signed by the deponent in the presence of the commissioner.

XV. The commissioner's return shall be as follows:

STATE OF ——, COUNTY OF ——, *ss.*

On this —— day of ——, A. D. ——, personally came —— ——, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of —— ——, taken at the request of —— ——, to be used in the investigation of a claim against the United States now pending in the court of claims, in the name of —— ——. The adverse party was notified, did —— attend, and did —— object.

—— ——, *Commissioner.*

Fees of witness, ——.
Travel, ——.
Attendance, ——.
Commissioner's fees, ——.

XVI. The commissioner shall enclose the commission, depositions and exhibits, if any, in a packet under his seal, and direct the same to the clerk at Washington, and deposit the packet in the post-office.

XVII. The commissioner shall not be obliged to certify and forward the deposition taken for either party until his fees for the taking of the same, and the postage, shall have been paid or tendered to him by the party at whose instance the commission issued, which fees shall be such as are now, or may hereafter be, prescribed by congress for the performance of similar duties by commissioners; and the fees of witnesses shall also be such as are now, or may hereafter be, prescribed by congress, and shall be paid by the party at whose instance the witnesses appear.

XVIII. No objection to a deposition will be considered as waived because such objection was not taken before the commissioner.

XIX. No counsel will be permitted to practise in the court unless he is a man of good moral character, and has been admitted or licensed to practise in the supreme court of the United States, or in the highest court of the District of Columbia, or in the highest court of some state or territory, of which admission the certificate of the clerk of such court or such license will be the only evidence; and, before admission, such counsel shall be sworn to support the constitution of the United States, and that his conduct as counsel shall be upright and according to law. But any claimant may appear in person and manage his own cause.

XX. At the time of filing the petition, or within a reasonable time afterwards, the petitioner may, if he choose, file a brief of the legal points and authorities on which he relies to maintain his case, and the solicitor shall, within a reasonable time thereafter, file a brief in answer thereto. The case shall then be entered on a separate docket, called the law docket, and the cases thereon will be taken up and disposed of in their order; and cases may be entered upon the law docket, and submitted, by consent, in vacation.

XXI. When the claimant's case is prepared, he shall notify the solicitor thereof, furnishing him at the same time with a printed copy of his brief. The solicitor, within a reasonable time thereafter, shall furnish the opposite counsel with a printed copy of his brief, and file copies of both briefs with the clerk. When the briefs are thus filed, the clerk shall enter the case on the trial docket. At least three days before any case will be called for argument, such printed briefs shall be furnished to each of the judges, and contain all the positions and authorities relied on. No *viva voce* arguments on behalf of either party will be permitted to continue more than two hours, nor will counsel be permitted to take other grounds or to refer to other authorities than those stated in the briefs. The cases will be called for argument or submission in the order in which they shall be thus prepared.

XXII. In the computation of time mentioned in these rules, all Sundays, and also the day of the service of any notice, and the day on which a party is required to appear, or on which any act is required to be done, shall be excluded.

XXIII. No paper filed in a cause shall be taken from the clerk's office, except by one of the judges, without permission of the court, and by leaving a certified copy with the clerk.

XXIV. If the claimant die pending the suit, his proper representative may, on motion, be admitted to prosecute the claim.

The Character of Thurlow. — Lord Thurlow had been lord high chancellor for fourteen years, and had then and since enjoyed great reputation for depth of thought and reach of understanding, for erudition in classical literature and learning in his profession, for inflexible integrity and sternness of character, which assumed the appearance of austerity, and occasionally even of brutality. As a judge, he was revered throughout the country, especially by churchmen and magistrates. As a debater, he was dreaded in parliament for near twenty years; and even to the period of his death, the slightest word that dropped from his lips, though but to suggest an adjournment or move a summons, was greeted by a large portion of the house of lords as an oracle of departing wisdom or a specimen of sarcastic wit unrivalled in any assembly. To sustain this tremendous character he had, in fact, little but a rugged brow and sagacious countenance, a deep yet sonorous voice, some happiness of expres-

sion without much perspicuity of thought, some learning more remarkable for its singularity than its accuracy or practical use, and a large portion of ponderous but impressive wit, supported by a studied contempt and scorn for his adversary and his audience. Mr. Fox said once, with equal simplicity and drollery, "I suppose no man was ever so wise as Thurlow looks, for that is impossible." His language, his manner, his public delivery, and even his conduct, were all of a piece with his looks; all calculated to inspire the world with a high notion of his gravity, learning, or wisdom; but all assumed for the purpose of concealing the real scantiness of his attainments, the timidity as well as obscurity of his understanding, and the yet more grievous defects of his disposition and principles. He contrived in all his speeches to conjure up an opinion in his audience that choice, not necessity, induced him to leave the knotty points of the question untouched, that he fully understood them, that his knowledge on the subject was of no superficial kind, that he drew his conclusions from long and laborious researches, from premises established on abstruse and philosophical reasonings. He thus implied that the real grounds on which his opinion rested lay too deep for common intellects to fathom; and that, not thinking it worth while to pursue a train of argument which his hearers were unequal to follow, he had contented himself with loitering on his way, playing with the subject on the surface, and exposing the absurdities of his adversaries. This last he often did with much wit, and always with prodigious success. His humor, like the trunk of the elephant, even in its gambols and freaks, seemed to indicate a hidden and bulky strength, which, if called into action, would prove the most formidable of the forest. To give some instances of his manner. When, in the house of commons, Mr. Wedderburn, on the question whether General Burgoyne, a prisoner on parole, could vote, had displayed his eloquence somewhat affectedly by relating and commenting upon the story of Regulus, Thurlow humorously treated the classical allusion on which the polished orator plumed himself as a dry legal precedent, and began his remarks thereon with saying, "With respect to the *case of Regulus*, on which my *learned* friend has *laid such a stress.*" Again, in the lords, when Lord Stormont had been detailing, with a solemnity usual to him, the transactions of a meeting of country gentlemen at the Thatched House Tavern, Lord Thurlow described that part of the grave diplomatic senator's harangue as "that which the noble viscount in the green riband may have chanced to hear at the alehouse." And in a similar strain, when Bishop Horsley had quoted Mungo Park's description of the dresses of the native females of Africa as a proof that society had there reached some degree of refinement, he observed upon the argument with this preface: "With respect to the black women with their white petticoats, as far as they or their petticoats have any relation to the question, my *reverend* and learned friend who has introduced them will allow," &c. In scouting the professions, exposing the cant, and lowering the fopperies of his opponents, he was always successful; but with their arguments I never heard him grapple. He could often confound and perplex an adversary; he seldom, if ever, threw any real light on a question. — *Law Times.*

A Foreign Watering Place — Lawyers and Attorneys in Vacation. — All professions are jumbled together during the "long vacation" of September in a pleasing variety. In the United States, the division of labor is not carried so far as in these dense capitals, and the relations of classes among themselves are not so intimate as they are here. One of the consequences of this is, that the several professions in America do not leave so visible an impress on their members as may be detected here,

where the very physiognomy, and gait, and gesture exhibit the class shibboleth so evidently as never to deceive the practised observer. Nay, here even the wife is tinctured by her husband's profession, which leaves its traces in her demeanor and conversation. Here, as everywhere else, the bar shines pre-eminent by its grace, its cultivation, its diction and its information, in social commerce. By a great good fortune they are placed in a happy position on the narrow verge which separates the plodding and the adventurers' classes of society; elevated by the spirit of their profession to the highest standard of honor, spirit and integrity, the pursuit of their avocation incessantly throws them into near contact with all varieties of adventurers. Commerce with lawyers has all the *safety* the highest social circles can afford, and all that piquancy which we find in adventurers. They penetrate even more deeply into the hidden mysteries of life than the Romish priest; the back office hears more secrets than the confessional. Their animated life in the judicial forum, their hourly clashings with men, daily efface the dust fallen from their books by night, and no trace of their late oil is visible, save in the reach of their information and the felicity of their diction. Amiable stains! But these mental illustrations are eloquent reproaches to those favorites of fortune who, though born in the purple chamber of affluence, and endowed with absolute command over time, have made no other uses of their advantages than to explore the boudoirs of lorettes, the secrets of dancing masters and the mysteries of stables, — a profound information they pour forth in the rude technical language called "slang." Secret upbraidings make them dread the entertaining commerce of the lawyers, and as they form the majority of society, they have accredited the opinion that the attorneys are better companions than the lawyers. It is true, nothing can be more amusing than an attorney taking his holiday. A buoyant schoolboy at a Christmas holiday is a sluggish animal to an attorney in September. The courts are closed! The lawyers are out of town! No more consultations! No more conveyancing! Boys have a phrase, — "jumping out of his skin;" the cheerful attorney looks as if at any moment he would frisk out of his skin. He banishes all thoughts of books, as if he were another Omar; he discards all thoughts of stamped paper and marriage contracts, wills, codicils, codes and process: —

> "Oh! when the long hours of the public are o'er,
> And we meet with champagne and a chicken at last,
> May every fond pleasure that moment endear,
> Be banished afar both discretion and fear."

So off he goes to amuse himself; ready to laugh as you crack your finger at him; disposed to read Joe Miller in stones, — jokes in everything; in a humor to take and to give stories; inquisitive about everything, — lorettes, foils, stables, steps, toilette, diamonds, dishes, — about everything but books; willing to be walking gentleman, brisk talker, or long soliloquizer, as best suits with the humor of the company he is in, — a very chameleon of the drawing-room! The bow has been bent eleven months; great is its rebound! For of all of the galley-slaves of fortune, none tug more uninterruptedly at the oar than the attorney in Paris. Night brings relief to the jaded merchant and the driven clerk. Five o'clock frees the office-holder for sixteen hours. The busiest lawyer, the most fashionable doctor, enjoy several hours of liberty; all have their quiet Sunday, full of pleasures and promenades. No rest falls to the attorney. The dawn must find him nailed to his desk, examining the papers to be brought that day into court. His noontide is consumed at the court house. When night comes, the conference with lawyers, the advice to clients, the dreary labors of conveyancing, consume half the night and

all of Sunday. September is the only breathing time he enjoys. — *For. Cor. Boston Atlas.*

Lawyers in America. — The questions which we propounded last week, relative to the position, profits and mode of remuneration of the lawyers in the United States, have produced the following very interesting replies. We shall be glad to receive further information.

Lawyers in America. — Twenty years ago I went to America, and passing up Fulton street, Broadway, I saw a large black tin signboard, with gilt letters, in front of a large building: "John L. and James ——, attorneys at law, and solicitors and counsellors in chancery, and commissioners for taking acknowledgments of deeds by married women; John L. ——, notary public." I was in their employ nearly two years, and the establishment was the largest in the States; there being a managing clerk, also a cashier and book-keeper, at two thousand dollars per annum, and above a dozen other clerks, several being Englishmen, myself, the junior, being about eighteen, and receiving four hundred dollars per annum, the lowest in the office except two boys. The bills in chancery were written on draft paper closely, and tied in the corner; conveyances, mortgages and bonds were printed on demy size paper, with blanks for names, sums, parcels, &c., to be obtained at the stationer's price, six and a quarter cents. We had many hundred conveyances, mortgages, &c., speculation in building plots being all the rage. The charge for the conveyance was five dollars, mortgage five, bond two and a half; and this was the lawyer's bill. There was a general registry, charging eight cents per folio for registering deeds, — a state office. This was also charged to the client. About this time occurred the memorable fact which furnished Colonel George P. Morris with materials for his humorous tale of the Frenchman taking a boat and a pole to fish at the bottom of the East River for his lot. Bills of costs for general business were much the same in items and charges as in England. Both my principals attended the courts as counsel in the causes of their own clients, sometimes as advocates for other attorneys. There were a few barristers practising as draughtsmen, text writers, &c. The celebrated Ogden, Hoffman, and Mr. (afterwards Chancellor) Kent were amongst them. The courts were held in the City Hall; Mr. Walworth was chancellor, Mr. Jones chief justice of the superior court. There were also the supreme court and United States district court, all common law courts. Richard L. Riker was recorder of New York. We had ex-sheriff Parkins in prison for contempt of an order made by "Chancellor Walworth," for discovery of his property, that it might be seized to satisfy judgments in actions for slander. My principals were solicitors and counsel, and were appointed receivers in the chancery proceedings. However, we received nothing but an air-gun and beaver-skin shooting-dress. There were, perhaps, three hundred lawyers, very few employing clerks, some few employing two, others merely a boy, others frequenting taverns and actually having no office; and I was informed that there were not a dozen such, or nearly such, respectable offices as ours in the Union. We had three articled clerks; I think they served three years. We did agency business for the lawyers of other states and cities. They did the same for us. There was a great deal of common law, speedy and cheap, particularly so on bills of exchange; a great many injunction suits, and a perfect hurricane of conveyancing at times. We sometimes began and completed from twenty to fifty in a day, according to the length of the parcels; the drafts being skeletons, as before stated, to be filled in with dates, names, sums and parcels. My principals kept magnificent establishments, were most liberal men, and

made incomes of almost fabulous amount for lawyers. Many of the building plots were purchased by Irish emigrants, and seventy-five per cent. of the purchase money allowed to remain on bond and mortgage; and the scenes that were enacted when Paddy was told that he must leave the room whilst the commissioner examined his wife were ludicrous enough, and sometimes the explanations given could hardly reconcile him to the ceremony. — W. S. R. Manchester, Sept. 10, 1855. — *Law Times.*

English Law Reform. — True to the motto, *ne sutor ultra crepidant*, I have spent a week or two running about among the assize towns, where the judges have been on their summer circuits. At Derby, Ipswich and Croydon, I have seen about half the great magistrates of Westminster Hall at their semi-yearly work in the provinces, and have thus liberally spent my time among the "big wigs." I have been, of course, much interested in watching their manner of guiding the great machine of justice, but I fear that any remarks I might make to you on the comparative legal anatomy of this country and our own, would be — saving your excellent reverence — very like casting certain jewels before certain animals, and so I forbear.

I cannot, however, refrain from telling you that a universal opinion appears to exist in favor of the innovation recently introduced here of examining the parties to the suit, both plaintiff and defendant, orally and in open court, exactly like ordinary witnesses. The judges and the bar all concur in saying that in the great majority of cases it simplifies and facilitates the operation of trying the cause; and although it of course sometimes leads to the presentation of very bad cases of perjury, still, on the whole, it is altogether well liked.

They are pressing here steadily, though, *more Anglico*, slowly, the course of legal reform. A limited liability bill has just passed, against the very adverse wish of the House of Lords, and especially the old lawyers in it, like Lord St. Leonards (Sugden). But you must not understand this as touching the question of *Limited Partnership*. It relates to what we call corporations, and, in a manner analogous to our general corporation acts, enables stockholders, by a single registration, to obtain corporate facilities and corporate immunities. An act has also been passed in regard to protested bills and notes, which enables the holder, by a mere notice to the debtor, to obtain judgment in twelve days, unless the court, on the application of the latter, sees fit to give him leave to defend; in other words, throws the whole *onus* on the defendant. Whether so rapid and stringent a creditor's process would be discreet and practicable with us, I leave your venerable head to decide.

An act of last year gives the common law courts the power to grant injunctions. This act is evidently drawn under the inspiration of our code, which, like many prophets, is more respected abroad than at home, and, with the oral examination of the parties as witnesses, evidently tends to a fusion of the common law and chancery tribunals; and so, like a dissolving view, melt away all the distinctive features of that perfection of reason, the old English legal system. — *Am. N. Y. Evening Post.*

Liability of Electric Telegraph Companies. — At the Co. C. of Northumberland, held at Newcastle, on Wednesday, before James Losh, Esq., judge of the court, an action was brought by a Mr. Potts to recover damages for an alleged breach of contract, which was to the following effect. The plaintiff, Mr. George Potts, shoemaker, had a bill due in London on the 5th August last, but as that day fell on the Sunday, the bill was to retire on Saturday. Mr. Potts had overlooked this, and when he went to the bank to advise its payment, he found he was too late. He

went immediately to the Electric Telegraph Company's office, and asked if they could get the bill returned; they replied in the affirmative. Mr. Potts then paid down the amount of the bill, 21*l.* 6*s.*, and 7*s.* for message and communication. He signed the contract, and on leaving the office he was assured it would be all right, and he would get the bill on Monday. He called on Tuesday, and the clerk was out; a day or two after he called again, without success. At his next call he found the managing clerk there, and discovered the bill had been dishonored, noted and protested, and there was 10*s.* expenses upon it. This was the ground of the action. The Telegraph Company put in the contract which the plaintiff had signed, which proved that they did not hold themselves responsible for the delivery of any unrepeated message, or for any uninsured message above the value of 5*l.* The message in question had neither been repeated nor insured; and the judge ruled that on the contract the defendants were not liable, and instructed the jury to give a verdict for the defendants. The company produced a great number of witnesses to show that the failure in the message was owing to the interruption in the wires, both between York and Newcastle and York and London. They had also offered to refund to the plaintiff the full amount that he had in the transaction. Mr. Blackwell argued that the company had not fulfilled all the contract. If they were not liable on the contract for the message on which 4*s.* had been charged, they had not fulfilled the contract for which the 3*s.* commission was paid. The jury appeared to have a conviction in favor of the plaintiff, but gave their verdict as directed by the judge.—*Law Times.*

A Mistake. — The *Plymouth Journal* says a laughable story is told of our eminent chief magistrate. It has caused a great deal of amusement. The other day, when the right worshipful the mayor was in town, he called upon the admiralty, and saw the learned Mr. Phinn, the secretary, who, as late recorder of Devonport, we may suppose to be especially accessible. The object of the mayor's visit was to complain of the existence of a wall adjoining the military prison where the Russian prisoners are confined, and which has long been regarded as an annoyance to the town, from its impeding the traffic on the Milbury road. It was an object of the town to get this wall pulled down, and numerous applications have been made to the ordnance for that purpose, but without success. The mayor, however, thought that he would try his power of persuasion, and accordingly he waited upon Mr. Phinn, and asked him if he would have the wall *razed*. The learned secretary said he saw no reason why the wall should not be *raised*, and he proceeded at once to one high in office, and soon returned and informed the mayor that he should have his official wishes gratified. The right worshipful returned to Plymouth in great glee, described to the council his marvellous success; the council thought themselves bound to do the thankful, and they therefore voted him their solemn thanks, thinking that in a few days the traffic would be no longer impeded by the unsightly wall. But what was the public astonishment in a few days after, when a number of masons were seen busily engaged in *raising* the wall instead of demolishing it. Inquiries ensued, when it turned out that the high and contracting parties had misunderstood each other; and that, while the mayor had talked of razing the wall, he had intended that it should be demolished. Had the mayor not walked on stilts, or used a lingo which is so uncommon to him, he would not have been so misunderstood. The consequence is, that another memorial has gone up to the admiralty, praying that the wall may be *razed*, not *raised*; and we hope that the prayer may prove successful, and that there may be no further cloud over the official mind as to what the wants of the public really are. — *Ibid.*

Notices of New Books.

THE AMERICAN LAW OF REAL PROPERTY. By FRANCIS HILLIARD, Counsellor at Law. Third edition, greatly enlarged and improved. In two volumes. Vol. II. New York: Banks, Gould & Co., 144 Nassau street. Albany: Gould, Banks & Co., 475 Broadway.

We are glad to see that this work has attained very considerable popularity, and has now reached a third edition. It must have been a work of great labor and study, and in general it appears to be well done. It has been the intention of the author, as stated by him in the preface to the first edition, to produce a book calculated to meet the wants of the American practitioner, without forcing upon him the expense of the purchase of all the matter in the English treatises on real property which are entirely inapplicable and useless here.

The great difficulty which Mr. Hilliard has had to contend with, — one which meets at the outset any author of an American legal elementary work, — is the necessity of adapting it to the law and practice of so many different states in the Union, all recognizing the common, and yet each having diversities created by statute and called for by the exigencies of their respective situations. A single state is too narrow a market both as to reputation and profit to satisfy either author or publisher. The Union comprises so many fields, under modes of cultivation as diverse as their climates and situation, that a work intended for all of them must necessarily require greater labor in preparation, and be of larger bulk, than one that is designed, like an English work, for a homogeneous class of readers. In illustration of these remarks, let us refer to the seventy-first chapter of this work, second volume, p. 167, "Statutes of limitations." Not more than half of this chapter is taken up in the statement of general principles, the other half being necessarily devoted to the modified details of the statutes of limitations in the different states of the Union.

In a passage taken at random in this work, we find some inaccuracy or obscurity of statement. In vol. 2, p. 226, ch. 78, the 18th section is as follows: —

"In Maryland, if a division among heirs is impracticable, the property is allotted to the oldest, and, if he declines, to the next in age, and so on. If none will take it, it is sold; if all are minors, not till the oldest is twenty-one. The bond, given by him who takes the whole, is a lien on the land. Where an heir assigns his interest, the assignee may ask for partition. If the oldest male is an infant, the oldest female, of age, may elect. If the land is subject to curtesy, this shall be first set off. If indivisible, and there is no election, there shall be a sale, free from curtesy, and the tenant shall have a share of the proceeds. So one having any life estate."

Now here, although it may possibly be made out by implication, the statement is omitted that the party taking the land is to make a pecuniary compensation to the others for their shares; and further on, the sentence beginning, "If the land is subject to curtesy," &c., hardly conveys an intelligible proposition. In a work intended for general use, such oversights as these should not be allowed. We do not believe, however, that they are frequent.

We think that Mr. Hilliard has offered a valuable addition to the resources of the American bar, and we wish him all success in his undertaking.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Allen, Wm H. *	Beverly,	Oct. 31, 1855,	John G. King.
Alley, Timothy N. †	Lynn,	" 23,	John G. King.
Ashley, Bradley M.	Fall River,	" 1,	E. P. Hathaway.
Ayer, Rebecca	Boston,	" 8,	Isaac Ames.
Bachman, Herman ‡	Haverhill,	" 10,	John G. King.
Baldwin, James	Egremont,	" 29,	James Bradford.
Bateman, Horatio	Roxbury,	" 20,	Isaac Ames
Beal, George T.	Boston,	" 27,	J. M. Williams.
Bennett, Samuel E.	Canton,	" 20,	Charles Endicott,
Bidwell, Nathan §	Boston,	" 25,	Isaac Ames.
Brown, Thomas B. †	Lynn,	" 23,	John G. King.
Cheney, John E.	Boston,	" 1,	Isaac Ames.
Clapp, James H.	Roxbury,	" 18,	Francis Hilliard.
Coden, John	Lynn,		John G. King.
Coolidge, Jona. F	Framingham,	" 17,	John W. Bacon.
Cudworth, Paul H.	Chesterfield,	" 29,	H. H. Chilson.
Cushing, Charles	Abington,	Sept. 27,	Perez Simmons.
Damon, Calvin A. ‖	Marshfield,	Oct. 16,	Perez Simmons,
Dana, David	Lowell,	" 9,	Isaac S. Morse.
Decker, Wm. *	Beverly,	" 31	John G. King.
Dennis, Jonas	Lowell,	" 1,	Isaac S. Morse.
Guild, Ebenezer ¶	Southbridge,	" 15,	Alexander H. Bullock.
Guild, Harlow M. ¶	Southbridge,	" 15,	Alexander H. Bullock.
Hobbs, James	Boston,	" 5,	Isaac Ames.
Howard, George L.	West Bridgewater,	" 18,	Perez Simmons.
Kastor, Isidor H. ‡	Haverhill,	" 10,	John G. King.
Kelly, Aratus M.	Brookfield,	" 1,	Alexander H. Bullock.
Leland, Daniel, jr.	Cambridge,	" 23,	John W. Bacon.
Leonard, Nehemiah	Boston,	" 9,	Isaac Ames.
Macomber, Chas. Wm. ‖	Marshfield,	" 16,	Perez Simmons.
Perry, John W	Natick,	" 29,	John W. Bacon.
Sanderson, Joseph	Groton,	" 17,	Isaac S. Morse.
Tilden, John	North Bridgewater,	Sept. 17,	Perez Simmons.
Tucker, Joseph A.	Lynn,	Oct. 4,	John G. King.
Usher, John G.	Winchester,	" 1,	Isaac S. Morse.
Vincent, Thomas	Lynn,	" 27,	John G. King.
Wheelock, Geo. H. §	Boston,	" 25,	Isaac Ames.
White, Simeon	Randolph,	" 9,	Charles Endicott.
Whittemore, Woodbury	West Boylston,	" 16,	Alexander H. Bullock.
Woodward, Benj.	Somerville,	" 27,	John M. Williams.

* Partners. † Partners.

‡ Partners. § Wheelock & Bidwell.

‖ Damon & Macomber, as individuals and copartners.

¶ E. Guild & Son.

Correction. — The name of Wm. L. & H. Finney, returned by Perez Simmons, commissioner, in September last, was incorrectly rendered to the printers as Wm. L. & H. *Tenney.*